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PROCEEDINGS AND ORDERS

DATE: [01/23/90]

CASE NBR: [89100524] CFX

STATUS: [

]

SHORT TITLE: [Sammiline Co., et al.]

VERSUS [Woods, John, et ux., et al.] DATE DOCKETED: [092689]

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Sep 26 1989 Petition for writ of certiorari filed.
Oct 24 1989 Brief of respondents Woods, et al. in opposition filed.
Oct 25 1989 DISTRIBUTED. November 9, 1989
Nov 3 1989 Reply brief of petitioners Sammline Co., et al. filed.
Nov 7 1989 Response requested. (Due December 7, 1989)
Nov 7 1989 Response requested from Pioneer Navigation, Ltd. CJ,
BRW. Due December 7, 1989
Nov 30 1989 Brief of respondent Pioneer Navigation, Ltd. in opposition
filed.
Dec 6 1989 REDISTRIBUTED. January 5, 1990
Dec 13 1989 Reply brief of petitioners Sammline Co., et al. filed.
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Jan 16 1990 Petition DENIED. Dissenting opinion by Justice White
with whom The Chief Justice and Justice Kennedy join.
(Detached opinion.)

1197

89-5240

No. 89-

Supreme Court, U.S.

FILED

SEP 26 1989

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CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING LTD.,
v. *Petitioners,*
JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,
and
PIONEER NAVIGATION, LTD.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTIONS PRESENTED

1. Where a foreign, independent stevedore stows cargo aboard a vessel in a manner that allegedly causes an injury to a longshoreman employed by a second independent stevedore while the cargo is being discharged, and where the cargo stowage condition allegedly causing the injury is open and obvious and known to the discharging stevedore and his longshoremen, did the Fifth Circuit err in holding that the vessel's owner and operator owe a duty under Section 5(b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 905(b) and this Court's opinion in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981), to protect the injured longshoreman from the alleged unsafe condition in the cargo stow?

2. Where the time charter between the shipowner and time charterer places responsibility for cargo operations with time charterer, and where a longshoreman employed by an independent contractor stevedore hired by the time charterer is injured during cargo discharge operations allegedly as the sole result of an unsafe condition in the cargo as stowed by foreign, independent stevedores also hired by the time charterer, did the Fifth Circuit err in rejecting the shipowner's claim for indemnity from the time charterer for all damages the shipowner is adjudged to owe plaintiffs?

3. Whether, as between a solvent shipowner and a solvent time charterer, a shipowner can have any liability as a matter of general maritime law for an injury to a longshoreman resulting from the negligence of the longshoreman's independent stevedore employer, where under this Court's *Scindia* decision a shipowner has no responsibility to supervise stevedoring operations, and where both the loading and discharging stevedores were independent contractors chosen and hired by the time charterer, not the shipowner?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioners, Sammiline Company, Ltd. and Hightworth Shipping Ltd. (defendants), and respondents, John and Beverly Woods (plaintiffs), Cooper/T. Smith Stevedores (intervenor), and Pioneer Navigation, Ltd. (third-party defendant). Sammisa Company, Ltd., was improperly named as a defendant and was dismissed at an early stage of the litigation; accordingly, Sammisa has no interest and is not named as a party herein.

Petitioners, Sammiline Company, Ltd. and Hightworth Shipping Ltd. have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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IN THE
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OCTOBER TERM, 1989

 No. 89-

SAMMILINE COMPANY, LTD.

and

HIGHTWORTH SHIPPING LTD.,

Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,

and

PIONEER NAVIGATION, LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 FOR THE FIFTH CIRCUIT

Petitioners, Sammiline Company, Ltd. and Hightworth Shipping Ltd., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on May 30, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 873 F.2d 842, and is reprinted in the appendix hereto, p. 1a, *infra*.

The jury interrogatories, opinion and order, judgment, amended judgment, and order denying post-trial motions

entered in the United States District Court for the Eastern District of Louisiana are unpublished and are reprinted in the Appendix hereto, p. 34a-47a, *infra*.

JURISDICTION

Asserting federal diversity jurisdiction, 28 U.S.C. § 1332, and the "saving to suitors" clause of the admiralty jurisdiction statute, 28 U.S.C. § 1333, respondents John and Beverly Woods brought this suit invoking the substantive general maritime law and Section 5(b) (33 U.S.C. § 905(b)) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") in the Eastern District of Louisiana. Respondent Cooper/T.Smith Stevedores, the employer of John Woods, intervened seeking to recover the workmen's compensation payments it made to Mr. Woods under the LHWCA. Pursuant to federal maritime jurisdiction, 28 U.S.C. § 1333, petitioners Sammiline and Hightworth filed third-party complaints against respondent Pioneer Navigation, Ltd., and Pioneer filed a cross-claim against Sammiline and Hightworth.

Pursuant to 28 U.S.C. § 1291, petitioners Sammiline and Hightworth timely appealed the district court's final judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit on May 30, 1989 entered a judgment and opinion vacating the judgment of the district court and remanding for a new trial on grounds not relevant to this writ application. In so ruling, however, the Fifth Circuit remanded for a retrial based on an interpretation of 33 U.S.C. § 905(b) and this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), that petitioners assert is in conflict with *Scindia* and the jurisprudence of other circuits. Because of the importance of this and other questions discussed herein, and because a correct interpretation of the *Scindia* issue will alleviate the need for a new trial, petitioners timely filed

a petition for rehearing and a suggestion for rehearing *en banc* with the Fifth Circuit. The Fifth Circuit denied both the petition and the suggestion on June 30, 1989.

Petitioners now invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), by filing this petition within the time period provided by 28 U.S.C. § 2101(c).

STATUTE INVOLVED

33 U.S.C. § 902. Definitions

When used in this Chapter—

* * *

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic], or bare boat charterer, master, officer, or crew member.

* * *

33 U.S.C. § 905. Exclusiveness of liability

* * *

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to pro-

vide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On July 19, 1984, longshoreman John Woods, an employee of Cooper/T.Smith Stevedores, was injured when a piece of pipe cargo he and other longshoremen were unloading from No. 2 hold of the M/V SAMMI HERALD swung out of control and hit him. The SAMMI HERALD is a foreign-flagged motor vessel owned by Hightworth Shipping Ltd., a foreign corporation, and operated and managed by Sammiline Company, Ltd., also a foreign corporation.¹ At the time of Woods' injury, Pioneer Navigation, Ltd., had time chartered the vessel from petitioners under a New York Produce Exchange time charter form.

Exercising its rights under the time charter, Pioneer had instructed the vessel to proceed to two ports in Brazil, where independent stevedores hired by Pioneer loaded the vessel with cargo destined for New Orleans and Houston. As found by the court of appeals (Appendix, 29a-30a; 873 F.2d at 857), Pioneer, the time

¹ Sammiline and Hightworth are collectively referenced in this brief as the shipowner, as for the purposes of this case their interests are identical.

charterer, was involved in the loading operations. Pioneer engaged in extensive communications with its representatives in Brazil concerning the cargo and how it was to be loaded (*id.*). At Pioneer's instructions, the vessel first sailed to the Port of New Orleans, where Pioneer had hired Cooper/T.Smith Stevedores, experts in the discharge of steel cargo, to unload the New Orleans cargo, including the pipe cargo being unloaded at the time of the injury to longshoreman Woods (*id.*).

Pioneer's Brazil stevedore and its longshoremen had loaded two consignments of pipe in the No. 2 hold, one destined for New Orleans and the other for Houston. The forward portion of the hold contained the Houston pipe, while the rear part contained the New Orleans pipe. This stevedore had stowed the pipe such that the rear-most ends of some Houston pipe overlapped the forward-most ends of some of the New Orleans pipe (Appendix, 2a-3a; 873 F.2d at 845).

This overlapped condition was apparent to everyone who looked into the hold (Appendix, 3a; 873 F.2d at 845). While the Cooper/T.Smith longshoremen grumbled among themselves and to their foreman concerning this condition, none of them complained to anyone from the vessel. The only person who discussed the condition of the cargo with anyone associated with the vessel was the Cooper/T.Smith stevedore superintendent, Mr. LaFrance, who merely informed the chief officer that because of the overlapped condition, the discharge would be slow.

The ship's officers and crew were not actively involved in the discharge operation. Cooper/T. Smith, an expert in steel cargo discharge operation, through Mr. LaFrance, the stevedore superintendent, and Mr. Waguespack, the foreman, had full control over discharge operations and were responsible for the safety of the longshoremen. While the ends of some pipes overlapped, the stevedore envisioned no particular danger in discharging the cargo.

Mr. Isenberg, a Cooper/T.Smith Senior Vice President, testified that his company had worked overlapped cargoes many times before and was experienced in unloading such cargo. Mr. LaFrance, the stevedore superintendent, testified that while the condition of the stow would require the discharge operations to proceed slowly, it did not present any unreasonable risk of harm; he believed that the cargo could be unloaded safely. Mr. LaFrance further testified that he would not have insisted that operations continue if he believed there to be any unreasonable risk or dangerous condition. Accordingly, the stevedore foreman instructed his men to discharge the cargo slowly—to the point of discharging only one pipe at a time when necessary (Appendix, 3a; 873 F.2d at 845).

As of the time of Woods' injury, the longshoremen had been unloading the New Orleans pipe cargo uneventfully for about two to two and one-half hours. Woods' injury occurred when longshoremen in the ship's hold instructed the longshoremen operating the ship's crane to lift a load consisting of three or four pipes connected to the crane's "break-out" line. When the crane operator lifted the line a little, the forward end of one of the pipes in the load jammed against the after end of the Houston cargo, causing the rear end of the jammed pipe to swing out of control. Woods ran, but caught his foot in a gap in the cargo and was hit by the swinging pipe (Appendix, 3a-4a; 873 F.2d at 845).²

After receiving workman's compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), Woods and his wife sued Sammiline,

² As the Fifth Circuit correctly found, gaps such as the one in which Woods caught his foot are a normal and expected condition that occurs during the discharge of pipe cargo, which was open and obvious to the stevedore and his longshoremen. Appendix, 18a-19a; 873 F.2d at 852.

Hightworth, and Pioneer. Mr. and Mrs. Woods asserted federal diversity jurisdiction, 28 U.S.C. § 1332, and the "saving to suitors" clause of the admiralty jurisdiction statute, 28 U.S.C. § 1333, in asserting their claim under Section 5(b) (33 U.S.C. § 905(b)) of the LHWCA. Asserting federal admiralty jurisdiction, 28 U.S.C. § 1333, Sammiline and Hightworth claimed indemnity from Pioneer for any damages they were adjudged to owe to Mr. and Mrs. Woods, and Pioneer cross-claimed for indemnity from Sammiline and Hightworth.

Mr. and Mrs. Woods' demands were tried to the jury on October 26, 27, and 28, 1987. At the conclusion of plaintiffs' case, Hightworth and Sammiline moved for a directed verdict, which was denied. The jury rendered a verdict on special interrogatories finding petitioners ten percent at fault, time charterer Pioneer twenty-five percent at fault, and stevedore Cooper/T. Smith sixty-five percent at fault (Appendix, 34a-36a).

The district court subsequently considered the question of liability between the petitioners and Pioneer. It denied both cross indemnity claims (Appendix, 37a-42a), and apportioned the stevedore's sixty-five percent fault between the vessel owner (2/7ths of 65%) and the time charterer (5/7ths of 65%) in proportion to the percentage of fault assessed by the jury against these two parties (*id.*). The district court, on November 20, 1987, entered final judgment (Appendix, 43a-44a).

On November 30, 1987, petitioners filed a written motion seeking a judgment n.o.v., or alternatively for a new trial or remittitur. The district court entered an amended judgment on December 2, 1987 (Appendix, 45a-46a), and denied the post-trial motions on January 14, 1988 (Appendix, 47a). Petitioners jointly filed their notice of appeal on February 12, 1988.

On May 30, 1989, the Fifth Circuit issued its decision, vacating the jury verdict in favor of Mr. and Mrs. Woods and remanding the case for a new trial, finding that two of the three theories advanced by plaintiffs upon which the jury was charged were not supported by the evidence. (Appendix, 1a-31a; 873 F.2d at 849-54. In remanding, however, the Fifth Circuit found that this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981), imposes a duty on a vessel to correct any dangerous condition in the cargo stow as loaded by the foreign independent stevedore and his longshoremen, before turning over the vessel to the discharging stevedore and his longshoremen (Appendix, 9a-11a; 873 F.2d at 847-49). The court of appeals concluded that the overlapping of some New Orleans pipe by some Houston pipe, although open and obvious, was a condition that the jury could have found violated this duty (Appendix, 13a-18a; 873 F.2d at 850-852). The Fifth Circuit recognized that its holding that a shipowner owes a duty regarding the condition of the cargo stow is in conflict with *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, — U.S. —, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988), under which petitioners would have no liability as a matter of law (Appendix, 9a-11a; 873 F.2d at 848).

Regarding responsibility for plaintiffs' damages as between the shipowner (Sammiline and Hightworth) and the ship's time charterer (Pioneer), the Fifth Circuit rejected petitioners' argument that the charter party placed the entire responsibility with the time charterer, entitling petitioners to full indemnity from the time charterer (Appendix, 26a-31a; 873 F.2d at 856-58). The Fifth Circuit relied on its decision in *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied sub nom.*, *Southern Stevedoring & Contracting Co. v. D/S Ove Skou*, 400

U.S. 902 (1970), while noting that two other circuits³ had ruled to the contrary (*id.* and n.18).

Finally, the court of appeals rejected petitioners' argument that as between a solvent shipowner and a solvent time charterer, the time charterer should bear responsibility for all negligence attributable to the discharging stevedore as a matter of law (Appendix, 31a; 873 F.2d at 858). Rather, the court of appeals concluded that the district court correctly apportioned responsibility for discharging stevedore's negligence between the shipowner and the time charterer in proportion to the negligence that the jury attributed to each of these parties (*id.*).

On June 12, 1989, petitioners and respondents John and Beverly Woods filed petitions for rehearing with the court of appeals. Additionally, petitioners filed a suggestion for rehearing *en banc*. The Fifth Circuit denied all petitions for rehearing and the suggestion for rehearing *en banc* on June 30, 1989 (Appendix, 33a). Petitioners now file this petition within the time period set forth in 28 U.S.C. § 2101(c), invoking the Court's jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

1. THE FIFTH CIRCUIT'S HOLDING THAT A SHIP-OWNER OWES A DUTY TO DISCHARGING LONGSHOREMEN CONCERNING THE OPEN AND OBVIOUS CONDITION OF CARGO STOWED BY INDEPENDENT CONTRACTOR STEVEDORES CONFLICTS WITH THIS COURT'S *SCINDIA* DECISION AND THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL

Nine years after Congress amended the Longshore and Harbor Workers' Compensation Act ("LHWCA") prohibiting longshoremen and other covered workers from

³ See *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1305-06 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976).

suing a shipowner for "unseaworthiness," this Court decided *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981), to clarify the negligence-based duties and standards of care that a vessel⁴ owed to longshoremen and other covered workers. In *Scindia*, a case filed under 33 U.S.C. § 905(b) involving an injury to a longshoreman resulting from a defect in the ship's gear, this Court enunciated the following principles:

First, quoting from *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 415 (1969), the Court held:

... the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances" ... to have the ship and its equipment in such a condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scindia, 451 U.S. at 166-67. This duty extended to include "the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations,"

⁴ The LHWCA broadly defines the term "vessel" to include the ship's time charterer as well as the ship's owner, operator, master, and crew. See 33 U.S.C. § 902(21), quoted at p. 3, above. The Fifth Circuit, however, has narrowly construed the term as used in *Scindia* to include only shipowners and operators. See Appendix, 8a, n.6; 873 F.2d 847 n.6. Petitioners assert that the Fifth Circuit is incorrect in so limiting the term as used in *Scindia*. Accordingly, petitioners' reference to the term "vessel" is in the broad sense as defined by Section 902(21).

id., at 167, and is breached if the vessel does not at least warn the stevedore of any hidden danger which would have been known to the vessel owner exercising reasonable care. *Id.*

Second, the Court held that a vessel may be liable where it actively involves itself in the cargo operations and negligently injures a longshoreman, or if it fails to exercise ordinary care to protect the longshoremen from hazards they may encounter from areas or equipment under the active control of the vessel. *Scindia*, 451 U.S. at 167.

Third, the Court held that once cargo operations commence, the vessel has no duty to inspect or supervise stevedoring operations. *Scindia*, 451 U.S. at 168. The vessel may rely on the stevedore to protect his longshoremen from unreasonable hazards, absent a contract provision, positive law, or custom to the contrary. *Id.*, at 170, 172. The vessel only has a duty when it actually knows that an unreasonably dangerous condition exists or has developed in the ship or its equipment and that the stevedore is continuing to expose his longshoremen to the condition and cannot be relied upon to protect them. *Id.*, 175-76.

Now, eight years after *Scinda*, the circuits still are divided as to the duty that a vessel owes to longshoremen. In the present case, longshoreman Woods was injured allegedly as a result of a dangerous pre-discharge cargo condition, thus subjecting this case to analysis under the first *Scindia* duty outlined above (Appendix, 6a-21a; 873 F.2d at 846-53). The district court instructed the jury that the vessel is liable to a longshoreman where a defect in the stowage of the cargo as loaded by an independent contractor stevedore gives rise to the longshoreman's injury (Appendix, 48a-49a). The Fifth Circuit, relying on *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), and *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), agreed, holding that this first

Scindia duty extended to dangerous conditions in the cargo stow, even though the cargo was stowed in a foreign port by another independent contractor stevedore, and not by the ship's crew (Appendix, 9a-11a; 873 F.2d at 847-49). The court of appeals found that the fact that the ends of some Houston pipes overlapped some of the New Orleans pipes may have constituted a pre-existing condition presenting an unreasonable risk of harm in breach of the first *Scindia* duty (Appendix, 13a-18a; 873 F.2d at 850-52).

The Fifth Circuit's holding directly conflicts with *Scindia*. There, this Court held that a vessel has no responsibility for supervising the stevedore and his longshoremen. The Court recognized that the independent stevedore and his longshoremen, and not the vessel, are the experts in conducting cargo stowage and discharge operations. See generally *Scindia*, 451 U.S. at 170. How can a vessel be held responsible for an injury allegedly resulting from a condition in a cargo stow created by an independent stevedore where the vessel expressly has no obligation under *Scindia* to oversee or supervise this independent loading stevedore? Furthermore, the first *Scindia* duty, set forth above, extends only to warning the stevedore and longshoremen concerning hidden or concealed dangerous conditions on the ship or with respect to the ship's equipment of which an expert and experienced stevedore would not ordinarily be aware. *Scindia*, 451 U.S. at 166-67. How can the Fifth Circuit's ruling be reconciled with *Scindia* where the undisputed testimony in this case was that the alleged defect related to the cargo stow, and not the ship or its equipment? Furthermore, even assuming that this *Scindia* duty could be extended to a condition in the stowage of the cargo, how can the Fifth Circuit's opinion be reconciled with *Scindia* where the alleged defective condition, i.e., the overlapped pipe, was obvious to everyone who looked into the ship's hold, including the "expert and experienced" stevedore and his longshoremen? The answer is that the

Fifth Circuit's holdings in this case, *Lemon*, and *Harris*, clearly are wrong and are directly contrary to this Court's *Scindia* opinion.

Furthermore, the Fifth Circuit correctly recognized that its holding in this case, and likewise its holdings in *Lemon* and *Harris*, are directly in conflict with the holding of the Third Circuit in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), cert. denied, — U.S. —, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988). In *Derr*, as in this case, longshoremen were injured allegedly as a result of a dangerous cargo stow turned over to the discharging stevedore. Correctly interpreting *Scindia*, the Third Circuit expressly rejected the contention that the vessel owed the discharging stevedore and his longshoremen any duty under *Scindia* with regard to the condition of the cargo. That court correctly reasoned that since *Scindia* imposes no duty on the vessel to supervise or inspect cargo loading operations undertaken by an independent stevedore, a vessel has no responsibility and owes no duty to the independent discharging stevedore and his longshoremen with respect to the condition of the cargo. *Derr*, 835 F.2d at 493-95. The *Derr* court correctly concluded that imposing such liability on the vessel would vest the vessel with the exact liability without fault that Congress sought to eliminate in amending Section 5(b) to outlaw longshoremen's recovery based on the warranty of seaworthiness. *Id.*

Not only the Third and Fifth Circuits, but also, the First, the Second, the Fourth, the Eighth, the Ninth, and the Eleventh circuits are in conflict. See *Melanson v. Caribou Reefers, Ltd.*, 667 F.2d 213, 215 (1st Cir. 1981) (distinguishing the condition of the cargo for which the vessel does not owe a duty from the condition of the ship's gear for which the vessel does owe a duty under *Scindia*); *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861, 862 (2d Cir. 1977) (a pre-*Scindia* case holding that the vessel has no duty for a cargo condition

created by an independent stevedore unless the shipowner has actual knowledge that the condition exists); *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070, 1074 (4th Cir. 1982) (holding that the vessel may be at fault where a cargo condition gives rise to discharging longshoreman's injury where the vessel "should have anticipated harm despite the fact that the risk of harm created by the [stowage condition] was open and obvious"); *Biggs v. Logicon, Inc.*, 663 F.2d 52 (8th Cir. 1981) (holding that the vessel had no liability where latent defect in cargo resulted in injury, since there was no showing that the vessel owner was in any better position than the stevedore to discover the defect); *Taylor v. Moram Agencies*, 739 F.2d 1384, 1386-87 (9th Cir. 1984) (distinguishing between cases where dangerous condition is hidden and cases where condition is obvious to unloading stevedore, and finding that while a duty to warn may be owed in the former case, no such duty is owed in the latter); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1302-04 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982) (holding that vessel owes a duty to discharging longshoremen with regard to concealed dangers created by a foreign stevedore); *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (holding that under the first *Scindia* duty, a vessel owes no duty where the condition of the stowed cargo is known and where the stowage condition does not affect the ability of an expert stevedore to discharge the cargo with reasonable safety).

Accordingly, while *Scindia* directly addressed the question of the duties owed by the vessel with regard to the condition of the ship and its equipment of which an expert and experienced stevedore would not be aware, it left the courts of appeals to infer what duty, if any, a vessel owes to the discharging stevedore and his longshoremen regarding the condition of the cargo as stowed by an independent stevedore. The courts of appeals have been unable to agree concerning whether and under what

circumstances a vessel may owe a duty and as to the extent of any such duty. Thus, a vessel's potential liability depends on the circuit in which a maritime litigant files his suit. Had Woods' suit been filed in the Third Circuit or the First Circuit, petitioners would have been entitled to summary judgment. *Derr, supra*; *Melanson, supra*. Had Woods' sued in the Ninth or Eleventh Circuits, petitioners also would have been entitled to summary judgment, as the alleged cargo stowage defect was open and obvious. *Taylor, supra*; *Turner, supra*; *Spence, supra*. The shipowner's liability in the Second Circuit would depend on whether the shipowner had active or constructive knowledge regarding the dangerous cargo condition. *Ruffino, supra*. In the Eighth Circuit, petitioners would have no liability, because the vessel was in no better position than the independent stevedore to discover and guard against the defect. *Biggs, supra*. However, in the Fourth and Fifth Circuits, petitioners could be liable for Woods' injury, even though it resulted from an open and obvious cargo condition created by an independent stevedore, and even though the stevedore was in the best position to protect against the danger. *Gill, supra*; *Woods, supra*; *Lemon, supra*; *Harris, supra*.

The result is discord, not the uniformity in the maritime law that the Constitution mandates and which this Court has often stressed as an essential to maritime commerce. *E.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 229 (1986); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970). This Court should grant a writ of certiorari to restore unity to this important area of the maritime law.

II. THE FIFTH CIRCUIT'S HOLDING THAT CLAUSE 8 OF THE NEW YORK PRODUCE EXCHANGE TIME CHARTER FORM DOES NOT ENTITLE THE SHIPOWNER TO INDEMNITY FROM THE TIME CHARTERER FOR PERSONAL INJURIES SUSTAINED DURING CARGO OPERATIONS CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS WHICH HAVE ADDRESSED THE ISSUE

Clause 8 of the New York Produce Exchange time charter form provides in pertinent part:

The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain.

Petitioners argued below that as between petitioners (the shipowner) and respondent Pioneer (the time charterer), this clause shifted operational control and responsibility for personal injury damages occurring during cargo operations from the shipowner to the time charterer, entitling petitioners to full indemnity from Pioneer for any damages petitioners may be adjudged to owe to Mr. and Mrs. Woods. A ruling in petitioners' favor would absolve them of the ultimate liability for the damages sought by Mr. and Mrs. Woods. The Fifth Circuit rejected petitioners' argument, based on its holding in *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied sub-nom.*, *Southern Stevedoring & Contracting Co. v. D/S Ove Skou*, 400 U.S. 902 (1970), that Clause 8 did not shift operational control and responsibility for personal injury damages to the time charterer (Appendix, 26a-31a; 873 F.2d at 856-58).

Because the New York Produce Exchange time charter form is one of the most prevalent, if not the most prev-

alent of the general time charter forms,⁵ and because other time charter forms contain clauses similar to Clause 8,⁶ the correct interpretation of this provision presents a question of great importance to the maritime law that should be addressed by this Court.

Besides the Fifth Circuit, two other major maritime circuits, the Second and the Ninth, have interpreted responsibility for personal injury damages under Clause 8. *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145, 151-53 (2d Cir. 1976); *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1305-06 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). Both circuits have held that as between the vessel owner and the time charterer, this clause places responsibility for personal injury damages resulting from cargo operations with the time charterer, entitling the vessel owner to indemnity from the time charterer.

⁵ The two most prominent admiralty hornbooks reprint versions of the New York Produce Exchange time charter form in providing an example of a time charter. See Schoenbaum, *Admiralty and Maritime Law Appendix*, Appendix E-2 at 732-41 (1987); Gilmore & Black, *The Law of Admiralty*, Appendix B at 1003-1010 (2d ed. 1975).

⁶ See M. Wilford, T. Coghlin, N. Healy & J. Kimball, *Time Charters* (2d ed. 1982) at 475 wherein is reproduced and discussed Clause 14 of the STB Form Tanker Time Charter; *e.g.*, see also, the "FERTICON" form, cl. 4, reprinted in 2B *Benedict on Admiralty* at 6-10 (6th ed. 1989); the "BALTIME" form, cl. 9, reprinted in 2B *Benedict* at 714 and 7-11; the "FONASBATIME" form, cl. 12, reprinted in 2B *Benedict* at 7-32; the "LINERTIME" form, cls. 10, 12, reprinted in 2B *Benedict* at 7-69; the "ZHONGZUTIME 1976" form, cl. 20, reprinted in 2B *Benedict* at 7-126; the "SYNA-COMEX" form, cl. 5, reprinted in 2B *Benedict* at 8-63; the "Bulk Ore Charter Party," cl. 11, reprinted in 2B *Benedict* at 12-10; the "ESSOTIME" form, cl. 21, reprinted in 2C *Benedict* at 17-47; the "MOBILTIME" form, el. 10(b), reprinted in 2C *Benedict* at 17-103; the "STANDTIME" form, cl. 19, reprinted in 2C *Benedict* at 17-146.5.

Additionally, at least two other circuits, the Sixth and the Eleventh, have questioned the validity of the Fifth Circuit's position. See *Migut v. Hyman-Michaels Co.*, 571 F.2d 352 (6th Cir. 1978)⁷; *Hayes v. Wilh Wilhemsen Enterprises, Ltd.*, 818 F.2d 1557 (11th Cir 1987).⁸

Even the Fifth Circuit has ruled inconsistently with its *Ove Skou* decision. In *Nitram, Inc. v. M/V CRETAN LIFE*, 599 F.2d 1359, 1366-67 (5th Cir. 1979), the Fifth Circuit held a time charterer (and not the vessel owner) ultimately responsible for damages to cargo under Clause 8. The Fifth Circuit in the instant case sought to rationalize this inconsistency by stating that *Nitram* involved damage to cargo, while *Ove Skou* and the instant case involved personal injury damages (Appendix, 28a-29a, n.18; 873 F.2d at 857 n.18). However, as the Second Circuit correctly stated in *Fernandez*, this distinction is one without a difference: "When Clause 8 shifts the responsibility of proper discharge of cargo to the charterer, that responsibility includes whatever damage re-

⁷ In *Migut*, the longshoreman fell through a partially uncovered hatch. While the Sixth Circuit refused to grant the shipowner indemnity from the time charterer, the court carefully pointed out that its decision rested on the fact that the partially uncovered hatch was a condition that had nothing to do with the cargo operations being conducted, as it pre-existed all cargo operations. *Id.*, 571 F.2d at 356. That court also noted that its result was not dictated by jurisprudence (such as *Ove Skou*) that predated the 1972 amendments to LHWCA, as the 1972 amendments, particularly Section 5(b) (i.e., 33 U.S.C. § 905(b)), "effected a major change in the relationships between shipowners, stevedores and longshoremen." *Migut*, 571 F.2d at 355.

⁸ In *Hayes*, like *Migut*, the longshoreman's injury resulted from a pre-existing ship's defect rather than from a cargo condition. Accordingly, that court denied the shipowner indemnity from the time charterer. However, in so ruling, the Eleventh Circuit distinguished *Ove Skou*, noting that the 1972 amendments to the LHWCA undercut the rationale of that case, rendering it questionable authority. *Hayes*, 818 F.2d at 1559 n.1.

sults from improper discharge, whether to the cargo or to the personnel unloading it." *Id.*, 542 F.2d at 152.

Finally, as the Eleventh Circuit noted in *Hayes*, the 1972 Amendments to the LHWCA, at the very least, overshadow any validity that the *Ove Skou* decision may have once had. *Id.*, 818 F.2d at 1559 n.1. Prior to the 1972 amendments to the LHWCA, a longshoreman injured aboard a vessel as a result of a defective cargo condition had a right to bring a claim based on the maritime doctrine of unseaworthiness against the shipowner, and the shipowner had a right to seek indemnity for any damages it may have been adjudged to owe to the longshoreman from the longshoreman's stevedore employer. See *Scindia Steam Navigation v. De Los Santos*, 451 U.S. 156, 164-166 (1981). Since the shipowner had a right to seek indemnity against the stevedore (who was and still is generally hired by the time charterer) directly, there was no reason for the shipowner to sue the time charterer for the same damages. After 1972, however, the shipowner could no longer obtain indemnity from the stevedore. *Scindia*, 451 U.S. at 165. This statutory change in the LHWCA fault allocation scheme rendered crucial the question of allocation of responsibility between the owner and time charterer, a question previously of little or no significance. Thus, interpretation of Clause 8 involves more than the resolution of a maritime contractual question upon which the circuits are divided. It involves interpretation of this common maritime clause in light of the vast statutory changes to the longshoreman personal injury fault allocation scheme made by the 1972 LHWCA Amendments.

This question, like the previous question, presents a significant maritime law issue upon which the circuits are divided. As with the previous question, this Court should grant a writ to restore the uniformity in the maritime law that the Constitution and this Court's jurisprudence demand.

III. THE FIFTH CIRCUIT'S HOLDING THAT THE SHIPOWNER AND THE TIME CHARTERER SHOULD SHARE RESPONSIBILITY FOR THE NEGLIGENCE OF THE INJURED LONGSHOREMAN'S STEVEDORE EMPLOYER IS ERRONEOUS AND PRESENTS AN IMPORTANT ISSUE OF MARITIME LAW MERITING REVIEW

Petitioners argued below that in the event that Clause 8 does not entitle them to complete indemnity, they ultimately should be responsible only for any negligence that the jury assesses against them, and not for any negligence that the jury assesses against the longshoreman's stevedore employer. While this Court held in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) that the vessel,⁹ if negligent at all, is responsible for any negligence assessed against the injured longshoreman's stevedore employer, the Court did not address how this responsibility should be allocated between a vessel's owner and time charterer. The Fifth Circuit rejected petitioners' argument that as between the vessel owner and time charterer, the time charterer, as the party who hired the negligent stevedore, should be fully responsible for the stevedore's damages as a matter of law (Appendix, 31a; 873 F.2d at 858). The court of appeals found that the trial judge did not err in dividing responsibility for the stevedore's negligence between the time charterer and the shipowner in proportion to the percentage of negligence assessed by the jury against each of these parties (*id.*).¹⁰

⁹ The term, "vessel" as used in the LHWCA, clearly includes the vessel's time charterer as well as the ship's owner and operator. See 33 U.S.C. § 902(21), quoted at p. 3, above which defines "vessel" to include the vessel's "owner, owner pro hac vice, agent, operator, charter [sic], bare boat charterer, master, officer or crew member." See also n.4, *infra*.

¹⁰ The jury verdict found the stevedore 65% negligent, the time charterer 25% negligent, and the shipowner 10% negligent. The district court divided the stevedore's 65% by assessing five-sevenths

Assuming that the vessel owes no duty under *Scindia* and 33 U.S.C. § 905(b) (*see* Argument No. I, above), or assuming that Clause 8 contractually vests all vessel liability with the time charterer (*see* Argument No. II, above), there is no need to address this question. However, should the Court find to the contrary, this question, to date addressed only in this case, is of extreme importance to the general maritime law. Since the broad definition of the term "vessel" under the LHWCA includes time charterers and vessel owners, and since most vessels are operating under a time charter, the question of responsibility for longshoring injuries between the shipowner and the time charterer potentially is involved in the overwhelming majority of longshoremen's personal injury cases filed under Section 5(b) of the LHWCA.

As between a shipowner, who under most charter parties is responsible for the navigational aspects of a voyage, and a time charterer, who normally is responsible for hiring stevedores and conducting cargo operations, why should the shipowner have any responsibility for the negligence of the *time charterer's* stevedore? Petitioners submit that while there may exist a sound policy reason for assessing all or part of these damages on the shipowner vis-a-vis the injured longshoreman, there is no policy or legal reason why a shipowner should bear this responsibility when there is another party, *i.e.*, the time charterer, who is also responsible under the LHWCA and who actually chose and hired the party who committed the negligence.

Petitioners submit that the Court should grant a writ to consider this question.

of 65% against the time charterer and two-sevenths of 65% against the shipowner.

CONCLUSION

For the reasons set forth above, petitioners submit that the Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3113

JOHN WOODS and BEVERLY WOODS,
Plaintiffs-Appellees,
and

COOPER/T. SMITH STEVEDORES,
Intervenor-Appellee,

v.

SAMMISA COMPANY, LTD., *et al.,*
Defendants.

SAMMILINE COMPANY, LTD., and
HIGHTWORTH SHIPPING LTD.,
Defendants-Third Party
Plaintiffs-Appellants,
Cross-Appellees,

v.

PIONEER NAVIGATION, LTD.,
Defendant-Third Party
Defendant-Appellee,
Cross-Appellant.

May 30, 1989

Appeals from the United States District Court
for the Eastern District of Louisiana

Before GEE, SMITH and DUHE,
Circuit Judges

JERRY E. SMITH, Circuit Judge:

In this case, our primary task is to determine when, and to what extent, the defendants in this action—a vessel owner/operator and a time charterer—are liable for injuries suffered by a longshoreman while discharging cargo from the vessel. After a trial on the merits, the jury found, using the principles enunciated in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), that both defendants, as well as the stevedore, the longshoreman's employer, were responsible for the longshoreman's injuries. The district court apportioned liability between the owner/operator and the time charterer according to the respective percentages of fault assigned to each by the jury. Both defendants appeal on numerous grounds. Because we conclude that two out of the three theories of liability on which the jury was charged should not have been presented to the jury, we vacate the judgment and remand for a new trial.

I.

A.

Plaintiff John Woods was a longshoreman employed by Cooper/T. Smith Stevedores ("Cooper/T. Smith" or the "stevedore") in New Orleans. In 1984, he was part of a crew of longshoremen assigned to discharge a quantity of steel pipe located in the hold of the M/V SAMMI HERALD. The hold contained two rows, running fore and aft along its length, of loosely-bundled steel pipe, stowed pipe-to-pipe with little dunnage. In the forward

half of the hold was steel pipe bound for Houston (the "Houston pipe"); the aft half contained the pipe which Woods's crew was directed to discharge (the "New Orleans pipe"). The Houston pipe was stacked considerably higher than the New Orleans pipe.

When the longshoremen looked into the hold before beginning discharge operations, they immediately noticed that, to varying degrees, the aft ends of some of the Houston pipe overlapped the forward ends of the New Orleans pipe. All parties agree that the overlapping condition of the cargo was created by the stevedore that loaded the pipe in Brazil. Testimony at trial indicated that, although the overlapping condition of the cargo was not unprecedented, the more common method of stowing steel pipe was to leave an "alleyway" between the two sets of pipe such that either set of pipe could be lifted vertically without coming into contact with the other.

The longshoremen agreed among themselves that it was a "bad stow," and the crew's superintendent told members of the ship's crew that the discharge would have to proceed very slowly because of the cargo's condition. The crew, including Woods, nonetheless was instructed to discharge the New Orleans pipe, although it was told to proceed as carefully as necessary, even if that meant discharging the cargo one pipe at a time.

Woods and his fellow longshoremen began to discharge the New Orleans pipe using the "break out" method, taking small quantities of pipe and attempting to maneuver them around the overlapping Houston pipe and out of the hold. The discharge proceeded uneventfully for about two hours until disaster struck. While the crew was discharging a three- or four-pipe bundle of New Orleans pipe, the forward end of the bundle became "jammed" in some overlapping Houston pipe, which caused the aft ends of one or more pieces of the New Orleans pipe to swing violently in the direction of Woods and the other long-

shoremen standing nearby in the hold. The longshoremen attempted to run across the uneven surface of the pipe cargo to avoid being struck by the swinging pipe. Woods was unable to avoid serious injury, however, when he fell into a gap between several pipes and was struck by the swinging pipe.

B.

After collecting workers' compensation and medical benefits from Cooper/T. Smith, Woods and his wife sued Sammiline Company, Ltd. ("Sammiline"), the operator of the vessel, and Hightworth Shipping, Ltd. ("Hightworth"), the vessel's owner (collectively, the "owner/operator"), for damages under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b). Cooper/T. Smith immediately intervened, seeking reimbursement of its payments made to Woods.

Sammiline and Hightworth denied liability; additionally, Hightworth filed a third-party complaint against Pioneer Navigation, Ltd. ("Pioneer"), the time charterer of the vessel, alleging that if the vessel interests were in any way responsible for Woods's injuries, Pioneer was the responsible party. Pursuant to Fed.R.Civ.P. 14(c), Hightworth also tendered Pioneer as a direct defendant to the plaintiffs. To round out this flurry of procedural machinations, Pioneer cross-claimed against Hightworth, alleging that the owner/operator was solely responsible for Woods's injuries, and the Woodses then filed an amended complaint naming Pioneer as a defendant.

After a trial on the merits, the jury returned a verdict in which it found that the owner/operator, the time charterer, and the stevedore were all negligent and that each party's negligence was a legal cause of Woods's injuries. When asked to apportion responsibility for Woods's injuries, the jury found the owner/operator 10% responsible, the time charterer 25% responsible, and the stevedore 65% responsible. Finally, the jury awarded

Woods \$550,000 for his injuries, and Woods's wife \$150,000 for loss of consortium.

The district court then considered the question of liability between the owner/operator and time charterer. It denied each party's claim for indemnity from the other and, because the stevedore was not a defendant in the action, apportioned the stevedore's 65% responsibility between the owner/operator (10/35 of 65%, or 18.57%) and time charterer (25/35 of 65%, or 46.43%) in proportion to the percentage of fault assessed by the jury against the two defendants.¹ Judgment was entered accordingly, with Cooper/T. Smith recovering its past compensation and medical expenses out of Woods's recovery.²

II.

Both the owner/operator and the time charterer vigorously contest the jury's findings that they were legally responsible for Woods's injuries. Because the defendants filed the requisite motions for directed verdict and judgment notwithstanding the verdict, we review the jury's findings using the standard enunciated in *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc). Thus, we review the record to see whether "there is substantial evidence of such quality and weight that reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusions." *Id.* at 374.

¹ Under the rule of *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979), the owner/operator and the time charterer were held responsible for the stevedore's negligence as well as their own. See *Hill v. Texaco, Inc.*, 674 F.2d 447, 449 (5th Cir. 1982).

² Under the LHWCA, an injured worker's employer is entitled to reimbursement for its past compensation and medical expenses from the net proceeds of any recovery by the injured worker from a third party. See *Peters v. North River Ins. Co.*, 764 F.2d 306, 312 (5th Cir. 1985).

A.

Title 33 U.S.C. § 905(b), provides in pertinent part:

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly. . . .

Neither the owner/operator nor the time charterer contends that it is not amenable to suit under section 905 (b);³ rather, their first argument on appeal is simply that they have not breached any duties owed to Woods.

In *Scindia*, the Supreme Court clarified the scope of the duties owed by a vessel to stevedores and longshoremen. Starting from the general proposition that a "shipowner may rely on the stevedore to avoid exposing the longshoremen to unreasonable hazards," 451 U.S. at 170, 101 S.Ct. at 1623, the Court stated that the vessel nonetheless "owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.'" *Id.* at 166, 101 S.Ct. at 1622 (quoting *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 415, 89 S.Ct. 1144, 1150, 22 L.Ed.2d 371 (1969)). The Court identified three aspects of this limited duty, only two of which are relevant here.⁴

³ Title 33 U.S.C. § 902(21), defines "vessel" as including the vessel's "owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member." We have previously held that time charterers are included within the definition and are therefore amenable to suit under § 905(b). See *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1338 (5th Cir. 1987).

⁴ In what may be identified as the second *Scindia* duty, the Court stated that a vessel may be liable "if it actively involves itself in

First, the Court indicated that the vessel must exercise ordinary care

to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety. . . .

Id., 451 U.S. at 167, 101 S.Ct. at 1622. A corollary of this first *Scindia* duty, the Court expained, is that the vessel has a duty to warn the stevedore of any hazardous conditions on the ship or with respect to its equipment of which the stevedore cannot be expected to be aware, but of which the vessel has or should have knowledge. *Id.* Although the Court did not explicitly so hold, this duty apparently governs the vessel's conduct before stevedoring operations have begun.⁵

The third *Scindia* duty is somewhat more nebulous and applies to the vessel's responsibilities once stevedoring operations are underway. As to this duty, the Court began its discussion by again postulating that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore." 451 U.S. at 172, 101 S.Ct. at 1624. The Court reasoned, however, that a shipowner nonetheless could be liable under section 905(b) if it had actual knowledge of a dangerous condi-

cargo operations and negligently injures a longshoreman" or if it fails to exercise due care in maintaining equipment and areas of the ship over which it has "active control" during the stevedoring operation. 451 U.S. at 167, 101 S.Ct. at 1622. The jury in this case was not charged on this theory; thus we have no reason to consider it on appeal.

⁵ See *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986); *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir. 1983); *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1246-47 (5th Cir. 1982).

tion present during the stevedoring operation and actual knowledge that the stevedore was not acting to correct it:

[I]f [the stevedore's] judgment . . . was so obviously improvident that [the vessel], if it knew of the defect and that [the stevedore] was continuing to use it, should have realized the [defect] presented an unreasonable risk of harm to the longshoremen, . . . [the vessel] had a duty to intervene [and correct the defect].

Id. at 175-76, 101 S.Ct. at 1626-27. See also *Hélaire v. Mobil Oil Co.*, 709 F.2d 1031, 1038-39 (5th Cir. 1983).⁶

⁶ The *Scindia* Court uses the word "vessel" throughout, thereby arguably suggesting that the opinion applies to all parties within the statutory definition. We have previously interpreted *Scindia*, however, as establishing that the duties owed to stevedores and longshoremen only by owner/operators. See *Kerr-McGee*, 830 F.2d at 1340 n. 8.

The underlying principle is that each defendant in a § 905(b) action is liable only for its own negligence, which presupposes the identification of the specific duties owed by each defendant to the plaintiff. *Scindia* determines the duties owed by owner/operators, which have actual dominion and control over the vessel; it does not determine the duties owed by other defendants, such as time charterers, that are similarly amenable to suit under § 905(b) but whose relationships to the vessel, and therefore to the plaintiff, differ from that of the owner/operator. We thus must look to the time charterer's relationship with the vessel—primarily, as defined in the time charter—to discover the duties and responsibilities against which the time charterer's conduct must be measured. See *Kerr-McGee*, *id.* at 1339.

On appeal, the time charterer nonetheless proceeds to assess its own liability primarily in terms of the *Scindia* duties imposed upon owner/operators. Except where otherwise noted, therefore, we will assume that the time charterer's duties toward the stevedore and its longshoremen employees are co-extensive with the owner/operator's duties under *Scindia*; hence, we utilize the same analysis of the *Woodses*' claims for each defendant.

B.

Initially, the defendants challenge the essence of the *Woodses*' action by questioning whether a vessel's duties under *Scindia* extend to the vessel's cargo, as distinguished from its gear and equipment. However, settled case law in this circuit forecloses the conclusion that a vessel does not, with regard to the stevedore and longshoremen, bear any responsibility for the vessel's cargo and its manner of stowage.

The defendants' argument is predicated upon a close reading of *Scindia*, which involved a section 905(b) complaint filed by a longshoreman whose injury resulted from a defective winch that was part of the ship's gear being used in cargo operations. The defendants therefore argue that the Court's statements regarding an owner/operator's duties must be read as delimiting its responsibilities for the things—i.e., the ship's gear and equipment—over which it has dominion and actual control.

Thus, according to the defendants, when the Court stated that "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore," 451 U.S. at 172, 101 S.Ct. at 1624, it meant what it said. This is so, the defendants contend, because actual control—the basis for the *Scindia* duties—over the cargo and cargo operations belongs, not to the owner/operator, but to the independent stevedore.

At least one court has accepted this argument under remarkably similar circumstances. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988), two longshoremen suffered injuries while discharging cargo that had moved or shifted during the voyage after being improperly secured by the loading stevedore. The

court rebuffed their attempt to hold the vessel's owner liable on the theory that it failed adequately to inspect or supervise the stowage of the cargo. Absent a contractual provision, positive law, or custom to the contrary, the court concluded,

Scindia compels the holding that a shipowner has no duty to supervise or inspect cargo loaded or unloaded by stevedores and therefore may not be held liable for injuries arising out [sic] the stevedore's failure to perform his job properly.

Id. at 493.⁷ As in *Derr*, the essence of the Woodses' claim is that the defendants failed to exercise proper control over the stowage and discharge of the pipe cargo; the defendants thus urge us to follow *Derr's* lead and hold that a vessel cannot be held liable for injuries resulting from the negligence of an independent stevedore.

Our court, however, has already visited this question and reached the opposite result. In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981), decided shortly after *Scindia*, a longshoreman injured during discharge operations sued the vessel owner under section 905(b), alleging that the owner was legally responsible for the negligent manner in which the cargo had been stowed and that such negligence was the cause of his injuries. An independent stevedore had loaded the cargo, and the

⁷ In reaching its holding, the *Derr* court went so far as to assume explicitly that the shipowner had actual knowledge of the fact that the cargo was improperly secured. That fact, the court concluded, could not suffice to create liability.

Even if it were true that a vessel customarily observes the loading of cargo, understandable in light of its potential liability for certain damage to cargo, . . . we agree with the district courts that such observation cannot be used to reimpose the general duty to supervise the stevedore. Nor can such observation be vaulted into the type of active involvement and control that would trigger the ship's liability.

835 F.2d at 494 (citations omitted).

plaintiff sought to hold the owner liable because the chief mate had actual knowledge that the stevedore was utilizing improper loading techniques. *Id.* at 116.

Although we noted the language in *Scindia* to the effect that the shipowner has no duty to supervise cargo operations or inspect the cargo, we extended *Scindia's* imposition of a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects of which it has actual knowledge and which it actually knows the stevedore does not intend to correct. That duty extends to conditions that arise before or during stevedoring operations. In so holding in *Lemon*, we assumed that the shipowner has at least the power to control the actions of independent stevedores: We stated that this duty "furnishes an incentive to the shipowner to correct those dangerous conditions he recognizes in addition to those he actually creates." *Id.* at 115.

Without questioning our assumption that such power exists in theory and practice, we have continued to follow our holding in *Lemon*. See *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299. (5th Cir. 1984). Because we are bound by this court's prior decisions unless and until they are reconsidered *en banc*, we must decline to accept the defendants' argument that an owner/operator owes no duties to a stevedore and longshoreman with respect to cargo operations that are solely within the stevedore's control.⁸

⁸ Even if we were able to accept the defendants' argument as to owner/operators, it is by no means clear that the same conclusion would obtain for time charterers. Again, the theory underlying the argument is that the owner/operator does not have practical dominion and control over cargo operations, the responsibility for which *Scindia* places in the hands of independent stevedores. At least in this case, however, practical dominion and control over the stevedores' actions may exist in the time charterer, which hired both the preparer of the cargo plan for the vessel and the loading and

C.

The Woodses claim that the owner/operator and the time charterer breached both of the above duties in three ways. Firstly, they contend that the two defendants, in violation of the first *Scindia* duty, were negligent in failing to ensure that the loading stevedore in Brazil stowed the pipe cargo in such a manner that it could be discharged in New Orleans with reasonable safety. Secondly, and also under the first *Scindia* duty, they contend that the defendants failed to warn Woods and his fellow longshoremen of the "hidden danger" presented by the gaps in the pipe cargo allegedly caused by the lack of dunnage and the loose stow. Their third theory of liability is that, because the pipe cargo as stowed could not be discharged with reasonable safety, the defendants, pursuant to the third *Scindia* duty, should have stopped the stevedore from proceeding to discharge the New Orleans pipe without first discharging the overlapping Houston pipe.

The district court charged the jury on all three theories of liability. Although it submitted the case to the jury on special interrogatories, the relevant interrogatory as

unloading stevedores. Presumably, it could have directed the stevedores' actions in accordance with its wishes, notwithstanding the fact that the stevedores legally may have been independent contractors.

The status of the relationship between the time charter and the stevedores thus suggests that it is not unreasonable to place upon the time charterer some duty to exercise reasonable care in its actions with respect to the cargo and its stowage. Thus, even if the time charterer does not have a duty of supervision and inspection, it nonetheless may have a duty to correct hazardous cargo conditions of which it has actual knowledge, for the simple reason that it has the practical ability to correct such conditions. Because we follow this court's precedent in holding that *Scindia* extends to conditions wholly within the cargo and its method of stowage, however, our discussion is restricted to pointing out the limitations of the defendants' argument and of the *Derr* court's reasoning.

to each defendant asked only whether that defendant was "negligent," to which the jury could answer "yes" if it found that defendant liable under any one or more of the three theories. In most cases, "[w]here two [or more] claims have been submitted to the jury . . . in a single interrogatory, a new trial may be required if one of the claims was submitted erroneously," unless we are "reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it." *Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir.), cert. denied, 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984) (quoting *E.I. duPont de Nemours & Co. v. Berkley & Co.*, 620 F.2d 1247, 1258 n. 8 (8th Cir. 1980)). Thus, if we find that the defendants were entitled to a directed verdict on any one of the three theories of liability, we must remand the case for a new trial unless we are "reasonably certain" that the jury's verdict was not based upon the erroneously-submitted theory or theories.

1.

As noted, *supra*, it is the law in this circuit that, under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety.⁹ The defendants may be found liable "for dam-

⁹ See *Harris*, 730 F.2d at 299 (analyzing a shipowner's actions regarding the stowage of cargo under the first *Scindia* duty); *Lemon*, 656 F.2d at 112, 116 (finding evidence sufficient to support a jury verdict that the shipowner had "breached a [*Scindia*] duty owed to longshoremen to exercise reasonable care in providing a reasonably safe work place" because the shipowner "was negligent in the method and manner of stowing the cargo"). Although we noted in *Harris* that "[i]f an independent contractor performs the loading operations, and the shipowner reasonably has no knowledge of a dangerous condition thereby created, the owner may escape liability," 730 F.2d at 299 n. 2, the cases cited for this proposition limit the scope of this exception to independent contractors "over whom [the shipowner] retained no con-

ages arising from a dangerous stow [in] situations where the [defendants] knew or should have known of the dangerous condition." *Harris*, 730 F.2d at 299 (citing *Lemon*, 656 F.2d at 116). In this case, neither defendant denies actual knowledge of the overlapping condition of the cargo; rather, they contend that the evidence does not establish either that the overlapping condition created an unreasonable risk of harm to the longshoremen or that they can be charged with knowledge of such a risk if it did exist. We disagree.

In *Harris*, a longshoreman sued a vessel owner after being injured while unloading sacks of coffee from the vessel. The sacks were not "tied," a procedure in which the sacks are stacked to provide greater stability, nor were they separated by dunnage, which are wood platforms placed every five sacks high. According to testimony from the injured worker and his fellow longshoreman, the stow was "dangerous" in that the coffee was "very, very poorly stored." Additional testimony indicated that it was customary in the industry for the ship to decide whether to use dunnage, that the use of dunnage involved added expense, and that the owners of the vessel never used dunnage.

We reversed the district court's grant of a directed verdict for the vessel owner. Although our attention was focused primarily upon whether the obviousness of the danger presented by the stow relieved the vessel owner

trol." *Moser v. Texas Trailer Corp.*, 694 F.2d 96, 98 (5th Cir. 1982). As we note *infra*, both the owner/operator and the time charterer had, in both theory and practice, authority to control the actions of the loading stevedore in Brazil. The owner/operator's claim that it exercised actual control over cargo operations only insofar as they affected the seaworthiness and safety of the vessel may be a correct empirical statement, but it does not mean that it is relieved of the duties imposed upon it by, *e.g.*, *Scindia*, *Lemon*, and *Harris*.

of liability, our conclusion regarding the legal sufficiency of the evidence described above is unmistakable:

The evidence presented by Harris would have been sufficient to support jury findings that Grancolumbiana was negligent in providing an unreasonably dangerous place to work and that Harris's injuries were caused by this dangerous condition. The case should not have been taken from the jury. . . .

Id. at 300.

Our holding in *Harris* guides our determination of the defendants' sufficiency-of-the-evidence argument on this point. As in *Harris*, there was ample testimony in this case to support a jury finding that the overlapping condition of the cargo meant that the New Orleans pipe could not be discharged with reasonable safety. Testimony at trial indicated that an overlapping stow was unusual, that it increased the risk of damage to the cargo and injury to the longshoremen, and that those risks could have been avoided by either stowing the Houston pipe without having it overlap the New Orleans pipe—as was contemplated by the cargo plan prepared for the time charterer—or unloading the overlapping Houston pipe before unloading the New Orleans pipe.¹⁰ In sum, there is ample evidence from which a jury could

¹⁰ We acknowledge that unloading the Houston pipe first would have involved considerable expense to the time charterer, but that fact does not change our conclusion. There is some evidence that the time charterer originally intended to have the ship dock in Houston and discharge the Houston pipe before going to New Orleans, but that, while the ship was at sea, the charterer instructed the vessel to proceed first to New Orleans. Had the vessel gone to Houston first as planned, there would be no question but that the stow would have been reasonable; but once the decision was made to discharge the New Orleans pipe first, the defendants were under a duty to reevaluate the condition of the stow and determine what steps, if any, needed to be undertaken to ensure a reasonably safe discharge.

conclude that the defendants therefore did not exercise reasonable care in providing the longshoremen with a reasonably safe place in which to work.

The defendants offer two arguments against this conclusion. Firstly, they assert that, although there was evidence that the overlapping condition of the cargo meant that the discharge would have to proceed "slowly," there was no evidence that the condition of the cargo presented an unreasonable risk of harm to the longshoremen. Secondly, they contend that there was no evidence that the defendants, through their employees, had any knowledge that the stow presented an unreasonable risk of harm.

The defendants' first argument is plainly foreclosed by *Harris*. There, evidence that a stow was "dangerous" and "very, very poor[]" was held to be sufficient to support a jury finding of negligence; we did not require that the record contain testimony, almost of a talismanic quality, that the stow be "unreasonably" dangerous or that the cargo could not be discharged with "reasonable" safety. We similarly refuse to do so here.

Whether a stowage method is reasonable depends upon a myriad of factors, including the absolute and relative danger which it presents vis-a-vis other stowage methods, and the feasibility of such other methods. In essence, the question is how a reasonable vessel interest exercising due care would allow the cargo to be stowed, and what it would conclude about its stowage methods. The evidence in this case is sufficient for a reasonable jury to conclude that a reasonable vessel interest would not permit the cargo to be stowed in this manner because of the danger to property and life which the stow would present.

The defendants' second argument is similarly without merit. They do not and cannot deny that they were aware of the overlapping condition of the cargo; the

record establishes beyond doubt that the owner/operator knew in Brazil that the cargo was being stowed in an overlapping fashion and that the overlap continued to exist when discharge operations began in New Orleans.¹¹ Cf. *Lemon*, 656 F.2d at 116. Their contention is only that they did not have actual knowledge of the danger which this condition presented such that liability may attach under *Scindia*.

But the defendants misread *Scindia*. Under the first *Scindia* duty, there is no requirement that the vessel have actual knowledge of the danger presented before liability will attach. Rather, that duty speaks only in terms of a failure to exercise due care (although we measure its duty with regard to, not the ordinary stevedore, but an "expert and experienced" stevedore exercising "reasonable care"). The law of negligence has never required that a tortfeasor actually be aware of the risks which its actions create before it may be held liable,¹² and *Scindia* does not add such a requirement in this context. See *Harris*, 730 F.2d at 299 (defendants may be liable under the first duty "[in] situations where the [defendants] knew or should have known of the dangerous condition") (emphasis added). All that is required is that the injury that results from the failure to exercise due care be reasonably foreseeable—and in this case a reasonable owner/operator and time charterer would have

¹¹ To the extent that the time charterer can be charged with at least part of the responsibility for the manner in which the pipe cargo was loaded in Brazil, see *infra* Part III.B, its liability can be justified along the same lines as for the owner/operator. See *Kerr-McGee*, 830 F.2d at 1341 ("Certainly the time-charterer has some responsibilities. It designates the cargo that the chartered vessel will carry, and if, for example, it carelessly chooses an unsafe combination of cargo to share the same hold, it could be liable for resulting damages. The time-charterer directs where and when the vessel will travel. . .").

¹² See W. Keeton, *Prosser & Keeton on the Law of Torts* § 31 at 169 (5th ed.1984).

perceived the dangers presented by the overlapping condition of the cargo.

2.

The defendants also contend that the evidence is insufficient to support a finding of liability on the theory that the gap in the pipe cargo into which Woods fell was a "hidden danger" such that the defendants were obligated to warn Woods of its existence. We agree that this theory of liability should not have been submitted to the jury.

An owner/operator is charged with the duty of warning the stevedore and longshoremen about

any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

Scinda, 451 U.S. at 167, 101 S.Ct. at 1622. The undisputed testimony in this case is that the existence of gaps in loosely-stowed pipe is a common phenomenon and, even if not discovered or created until discharge operations began, was open and obvious to Woods, his fellow longshoremen, and anybody who looked into the hold.

The "failure" of the defendants to inform Woods of such an obvious condition cannot serve as a basis for liability. See *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 69-71 (5th Cir. 1987), cert. denied, — U.S. —, 108 S.Ct. 1576, 99 L.Ed.2d 891 (1988).¹³

¹³ *Morris* indicates that even an "open and obvious" hazard may nonetheless serve as a basis for liability if the stevedore has no alternative to exposing himself to the danger other than leaving his job or facing criticism for delaying work. See 832 F.2d at 70. This theory—that the vessel cannot defeat liability by asserting

The "hidden danger" theory of liability thus should not have been submitted.

3.

Finally, the defendants claim that the evidence was insufficient to support a jury finding that they breached the third *Scindia* duty, which requires a shipowner to intervene in stevedoring operations if it has (1) *actual* knowledge of a dangerous condition that develops during the course of those operations and (2) *actual* knowledge that the stevedore has failed to remedy it. See *Helaire*, 709 F.2d at 1038-39. Although we have serious doubts as to whether the third *Scindia* duty is even applicable to this case,¹⁴ the defendants do not challenge the jury's finding

that the stevedore has exposed himself to an open and obvious hazard created by the vessel, unless the evidence shows that the stevedore decided to forego reasonable alternatives to exposing himself to the hazardous condition—runs throughout our discussions of a vessel's duties under *Scindia*. See *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 378 (5th Cir.1988); *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir.1983). In such circumstances, however, liability is more properly based, not upon the "hidden danger" theory, but upon the theory, described *supra*, that the defendant has failed to exercise due care to provide the stevedore with a reasonably safe workplace. The danger is no longer "hidden" in any sense of the word, but may nonetheless serve as a basis for liability if the vessel has a responsibility to prevent its creation or correct it once it exists. See *Lemon*, 656 F.2d at 116; *Teply*, 859 F.2d at 378; *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1057 (sic.) (11th Cir.1985).

¹⁴ In *Harris*, we distinguished the two relevant *Scindia* duties along the following lines:

Scindia was primarily concerned with a dangerous condition that develops within the confines of cargo operations after the stevedore takes control. The Court noted that a stevedore then becomes primarily responsible for the safety of the longshoremen 'the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of cargo operations that are assigned to the stevedore.' . . . The Court reasoned that liability would fall on the shipowner only if he knew of

on this ground; rather, they contend that there was no evidence to support a jury finding that they had actual knowledge of the hazard created by the overlapping condition of the cargo. We agree.

In instructing the jury on the third *Scindia* duty, the district court stated that the defendants could be found to have been negligent only if, *inter alia*, they "had actual

the later-developed danger and also knew that the stevedore was not taking steps to cure it.

Scindia also described the more general aspects of a shipowner's duty to longshoremen. Thus, the shipowner must exercise care to deliver to the stevedore a safe ship with respect to 'the ship's gear, equipment, tools, and work space to be used in the stevedoring operations.'

730 F.2d at 298-99 (quoting *Scindia*, 451 U.S. at 167, 172, 101 S.Ct. 1622, 1624) (citations omitted, emphasis in original). Accordingly, we explicitly stated in *Harris* that a shipowner's actions regarding the improper stowage of cargo—a condition that comes into existence before the discharging stevedore assumes control of cargo operations—are not to be judged by reference to the third *Scindia* duty:

The jury in *Lemon* found that the shipowner breached a duty to exercise reasonable care in failing to provide a reasonably safe place to work. . . . We were not concerned in *Lemon*, nor are we concerned here, with dangerous conditions that develop only after control of the ship has been given to the stevedore.

Id., 730 F.2d at 299.

Under the law of this circuit, therefore, the jury should not have been charged on the third *Scindia* duty. Because the defendants, preferring to concede that the third duty applied and to argue that the evidence was insufficient to support a finding that it had been breached, did not raise this issue in their motions for directed verdict and *j.n.o.v.*, we cannot find error on this ground. See Fed.R.Civ.P. 50(a) ("A motion for directed verdict shall state the specific grounds therefore."); *Dimmitt Agri Industries, Inc. v. CPC Int'l Inc.*, 679 F.2d 516, 521 (5th Cir.1982), cert. denied, 460 U.S. 1082, 103 S.Ct. 1770, 76 L.Ed.2d 344 (1983); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir.1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976); *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 67-68 (5th Cir. 1972).

knowledge that the condition would pose an unreasonable risk of harm to the longshoremen working on board the ship." Neither party objected to this instruction.

A review of the record convinces us that no reasonable jury could find that the defendants had actual knowledge that the overlapping condition of the cargo posed an unreasonable risk of harm to Woods and his fellow longshoremen.¹⁸ There is ample evidence that the defendants were aware of the overlapping condition of the cargo; conversely, there is no evidence that the defendants were actually aware that an "unreasonable risk of harm" was thereby created. The only evidence that might possibly support such a conclusion is testimony that the foreman of Woods's crew told one of the ship's officers that the pipe would have to be discharged "slowly" because of the overlap; standing by itself, that statement falls well short of putting the vessel interests on notice that the overlap created an unreasonable risk of harm to the longshoremen. In short, the Woodses failed to pierce the defendants' claims of blissful ignorance of the danger presented by the stow; no reasonable jury could therefore have found, in accordance with its instructions, that the defendants breached the third *Scindia* duty.

D.

Having thus found that the district court erred in submitting two of the Woodses' three theories of liability to

¹⁸ It is important to contrast this requirement under the third *Scindia* duty with the requirements of the first *Scindia* duty. Under the first duty, all that is required is that the shipowner "knew or should have known," see *Harris*, 730 F.2d at 299, of the dangerous condition; actual knowledge of the condition or the resulting hazard is not required. Under the third *Scindia* duty, however, such actual knowledge of the hazard is required. Thus, it is entirely possible to conclude that the defendants breached the first *Scindia* duty on the theory that they should have known that the overlapping condition was unreasonably hazardous while also concluding that no breach of the third *Scindia* duty occurred because the defendants lacked actual knowledge.

the jury, we have little choice but to vacate the judgment and remand for a new trial. Although the "hidden danger" theory played only a minor role at trial, the issue of the defendants' liability under the third *Scindia* duty was strenuously litigated by both sides, and occupies a major portion of the court's instructions to the jury. Moreover, because both the elements of the third *Scindia* duty and the actions to which it applies are different from those encompassed by the first duty, we cannot feel confident that the jury's finding of liability was based solely upon the first duty, or that a jury that found a breach of the third duty would necessarily find a breach of the first. Because we do not feel "reasonably certain" that the jury's verdict was not influenced by the erroneously-submitted second and third theories of liability, we remand for a new trial.

III.

In addition to their sufficiency arguments, the defendants have raised several other issues on appeal. As to certain of these issues—relating to jury instructions and the division of liability between the defendants—it is likely that the district court will have to confront them again on remand. Lest the court's rulings on these issues be the subject of appeal after the new trial, and therefore grounds for reversal and yet another new trial, we address these issues now to provide guidance for the district court in its future conduct of the case.

A.

The defendants contend that the district court erred by denying their request that the jury be instructed that a vessel owner

may reasonably rely on a stevedore's judgment that a condition, though dangerous, is safe enough for the longshoremen to work without injury. Thus, even if the plaintiff could establish that the vessel owner had knowledge [of the dangerous condition], the vessel owner still would be entitled to rely on the

stevedore's judgment that the condition presented, though dangerous, was safe enough for the longshoremen to work.

The defendants contend that the requested instruction correctly states the law in this circuit as set forth in *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1039 n. 12 (5th Cir.1983). We disagree.

Just as the trial court is obligated to instruct the jury on the law underlying the plaintiff's theory of recovery, it must do so as to defensive theories as well. See *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir.1985). The defendant's proffered instruction, however, must be legally correct and supported by the evidence; moreover, the court may refuse to give such instruction if the instructions that it does give cover the theory in substance, as it is the court and not the parties that has control over the language and form of the instructions. See *id.* at 425 n.10.

In this case, we agree with the district court's conclusion that the requested instruction "misstate[s the law] so badly that it's almost scary." *Helaire* stands for the eminently sensible proposition that in determining whether an owner/operator or time charterer has fulfilled its section 905(b) duties, the jury may consider the reasonableness of the stevedore's judgment in determining whether the vessel interests have acted reasonably:

The opinion in *Scindia* recognized that the owner's actual knowledge of a dangerous condition which later injured a longshoreman might not in itself make him negligent. It might well be 'reasonable' for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough.

709 F.2d at 1039 n. 12 (citing *Scindia*, 451 U.S. at 175, 101 S.Ct. at 1626). *Scindia* makes it plain, however,

that there are circumstances in which a stevedore's judgment will be so "improvident" that the owner/operator, if it has the requisite actual knowledge of the situation, is required to overrule the stevedore's judgment and take steps to correct a hazard. Similarly, it is the acknowledged rule in this circuit that a stevedore's decision to proceed in the face of an open and obvious hazard will not automatically immunize a defendant from section 905(b) liability.¹⁸

The requested instruction, by advising the jury that the defendants "would be entitled to rely" upon the stevedore's judgment, does not acknowledge these exceptions. The district court, which properly instructed the jury that "[a]s a general matter, the ship owner/operator and the charterers may rely on the stevedore to avoid exposing longshoremen to unreasonable hazards," correctly rejected the request to charge the jury on the defendants' view of the law.

B.

The time charterer also challenges the district court's refusal to instruct the jury (1) that the time charterer could be at fault only to the extent that it exercised actual supervision or control over the loading operations in Brazil, (2) that the party that prepared the stowage plan and the loading stevedores were independent contractors, and (3) that the time charterer bore no duty to supervise the actions of the independent contractors and was not responsible for their negligent acts unless the jury found that the time charterer "directly" con-

¹⁸ See, e.g., *Barrins v. Pelham Marine, Inc.*, 796 F.2d 128, 132 (5th Cir.1986) ("Although in some circumstances '[i]t might well be "reasonable" for the [ship] owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough,' *Heloire*, 709 F.2d at 1039 n. 12, it was not reasonable in this case for [the ship owner] to rely on [the stevedore's] judgment that the conditions were adequately safe.").

trolled and supervised their actions. We find no error in the court's decision not so to charge the jury.

Again, we review the court's decision under the standards of review set forth in *Pierce*. The first requested instruction plainly misstates the Woodses' theories of liability against the time charterer by completely ignoring the theory that the time charterer's responsibilities included taking corrective actions—in the form of instructing or authorizing the stevedore to unload the overlapping Houston pipe before it discharged the New Orleans pipe—once the pipe cargo was improperly stowed in Brazil. The requested instruction is thus incorrect when it states that the time charterer could be at fault "only to the extent that it exercised actual supervision or control over the loading operations."

The court's refusal to give the time charterer's second and third requested instructions was also proper. A party is entitled to have the jury charged on a defensive theory only if the theory is supported by the evidence. See *Pierce*, 753 F.2d at 425. Although we have consistently held that "a principal . . . who hires independent contractors over which he exercises no operational control has no duty to discover and remedy hazards created by its independent contractors," *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 437 (5th Cir.1984), the record in this case reveals that the time charterer did exercise substantial control over the actions of its representatives in Brazil.

There was substantial communication between Borda Livre (the time charterer's alleged "independent contractor" in Brazil who prepared the cargo plan, inspected the cargo, and mediated between the time charterer's representatives, the loading stevedores, and the time charterer) and the time charterer itself. These communications included instructions from the time charterer that Borda Livre arrange certain cargoes in a certain

manner to facilitate discharge. Thus, even if Borda Livre and the loading stevedores are considered independent contractors, the evidence establishes that the time charterer had the theoretical and practical ability to control their actions and actively did so on at least one occasion. The district court did not err by refusing to give the requested instructions.

IV.

After the jury rendered its answers to interrogatories on the issues of liability and damages, the district court proceeded to consider each defendant's claim that it was entitled to indemnity from the other defendant; the court also considered the allocation of responsibility for the percentage of fault ascribed to the stevedore, Cooper/T. Smith. The district court denied both the owner/operator's and the time charterer's claims for indemnity and allocated the stevedore's percentage of fault between the two defendants according to their own respective percentages of fault. The court was correct in so doing.

A.

In essence, the quarrel between the two defendants with regard to the indemnity issue is over who should be held responsible for the failure of the loading stevedore in Brazil to stow the pipe cargo so that it could be unloaded with reasonable safety. The time charterer argues that the terms of the charter party require a conclusion that at all times the owner/operator retained operational control over cargo operations, thus contractually precluding any imposition of liability upon the time charterer. Although we agree with the time charterer's interpretation of the charter party, we also agree with the district court that, going beyond the terms of the charter party, the time charterer did exercise some degree of operational control over cargo operations and thus can be held responsible for its own negligence.

The charter of the vessel was on a New York Produce Exchange (Government Form) Time Charter, a commonly-used document in the industry. Clause 8 of the time charter provides in pertinent part as follows:

The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, and trim, and discharge the cargo at their expense under the supervision of the Captain. . . .

The time charterer, relying upon our opinion in *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), cert. denied, 400 U.S. 902, 91 S.Ct. 139, 27 L.Ed.2d 139, 27 L.Ed.2d 139 (1970), contends that this contractual provision leaves operational control over cargo operations in the owner/operator, thus making it solely responsible for any injuries resulting from the manner in which the cargo was stowed.

In *Ove Skou*, a shipowner held liable for a longshoreman's injuries resulting from the loading stevedore's negligence in securing a hatch sought indemnity from the time charterer under the theory that, by an extension of *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), the time charterer impliedly warranted that the loading stevedore would perform its job in a workmanlike manner. See 365 F.2d at 351. We rejected the shipowner's argument, holding that no such warranty existed.

Essential to our holding was that the conclusion that the provision from the charter party quoted above does not shift operational control over cargo operations, and therefore responsibility for the actions of independent stevedores, from the shipowner to the time charterer:

[C]ause [8], specifying that the captain shall be under the orders of the Charterers 'as regards em-

ployment and agency' and that 'charterers are to load, stow, and trim the cargo' does not give to Time Charterer any operational control over these activities. Rather, these charter party provisions are essentially a specification of the party—owner or charterer—upon whom the ultimate financial cost rests for any one or more of the activities.

... In the absence of circumstances which would give rise to a liability for actions taken by an independent contractor—none of which are present here—Time Charterer had no responsibility to Shipowner or to third persons including longshoremen for acts of omission or commission by the stevedores.

Id. (footnote omitted).¹⁷ Thus, considering solely the issue of the contractual allocation of responsibility between the parties, *Ove Skou* compels the conclusion that, absent evidence to the contrary, the time charterer bears no responsibility to the owner/operator or third parties for the negligent acts of the loading stevedore.¹⁸

¹⁷ See also *Mallard v. Aluminum Co. of Canada*, 634 F.2d 236, 242 n. 5 (5th Cir.), *cert. denied*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1981). There, we reasoned as follows:

[*Ove Skou*] . . . holds that . . . clause [8] makes a charterer responsible for the costs of cargo handling, but in and of itself does not transfer operational responsibility from the owner. . . . In light of *Skou*, this circuit seems reluctant to find any shifts of operational responsibility for personal injuries to the time charterer absent clear language to that effect.

¹⁸ The owner/operator's attempts to distinguish *Ove Skou* or otherwise to convince us that the case has not survived the ravages of time are to no avail. The force of *Ove Skou*'s reasoning—that the contractual language "in and of itself," *Mallard, id.*, does not shift any operational control from the shipowner to the time charterer—has not been vitiated by the fact that the shipowner can no longer seek indemnity from the negligent stevedore, by the fact that the case may have been based on an unseaworthiness rather

Unfortunately, for the time charterer in this case, however, there is evidence that, notwithstanding the con-

than a negligence standard, or by the fact that the accident in that case arguably involved the ship's gear rather than its cargo. The *Ove Skou* court's interpretation of the contractual language did not turn upon—indeed, did not even mention—these facts; rather, it looked solely to the language of the contract. None of the numerous changes in the law since the time of that decision convinces us that our reasoning is no longer valid. Despite the fact that other circuits have seen fit to reject *Ove Skou* and hold that the charter party does shift operational control over cargo operations to the time charterer, see *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300, 1305-06 (9th Cir.1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed.2d 278 (1982); *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145, 151-53 (2d Cir.1976), both the holding and reasoning of *Ove Skou* are alive and well in this circuit, and with good reason.

The owner/operator also argues that the role of *Ove Skou* has been altered by some of our later opinions and that the owner/operator should be entitled to indemnity from the time charterer because the ship's master is, by contract, the time charterer's agent during cargo operations. The cases to which the owner/operator refers us hold that clause 8 may be read as providing that the captain's decisions regarding the "safety of the cargo," as opposed to cargo-related decisions going to the seaworthiness and safety of the vessel, are made on behalf of the time charterer, with the charterer therefore assuming responsibility for them. See *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1366 (5th Cir.1979); *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 433 (5th Cir. 1968), *cert. denied*, 394 U.S. 943, 89 S.Ct. 1272, 22 L.Ed.2d 477 (1969).

Both of these cases, however, involved questions regarding responsibility for damage to the cargo rather than for injuries to persons covered by the LHWCA, and neither case cites *Ove Skou*. It is entirely possible to reconcile the two lines of cases by stating that, although clause 8 leaves complete operational control over cargo operations in the shipowner, the time charterer nonetheless has assumed responsibility for some portion of the shipowner's decisions—but only that specified by contract. In any event, to the extent that the two sets of cases are arguably inconsistent, *Ove Skou*, being the earlier decision, is controlling in this case. See *Johnson v. Moral*, 843 F.2d 846, 847-48 (5th Cir.), *vacated on other grounds for rehearing en banc, id.* at 849 (5th Cir.1988).

tractual allocation of operational control over, and attendant responsibility for, cargo operations, it did have some degree of operational control over the loading operation. As noted above, there were extensive communications between the time charterer and its representatives in Brazil regarding the cargo and the manner in which it was to be loaded. The time charterer's instructions regarding the cargo, and its decision to go to New Orleans first instead of Houston, despite the fact that the cargo was loaded with a different itinerary in mind, indicate that the time charterer did not just pay the bills for cargo operations that took place beyond its control.

Although clause 8 in the charter party may preclude visiting liability upon the time charterer for the owner/operator's negligence, it does not preclude holding the time charterer liable for its own negligent acts or for the negligent acts of parties in Brazil over whom it exercised control. Indeed, this is precisely the case contemplated in *Ove Skou*, in which we stated that there may be "circumstances which would give rise to a liability for actions taken by an independent contractor." 365 F.2d at 351. See also *Kerr-McGee Corp. v. Ma-Ju Marine Servs., Inc.*, 830 F.2d 1332, 1342 (5th Cir. 1987). Because the jury found the time charterer itself to be negligent, it is not entitled to indemnity from the owner/operator.

Nor is the owner/operator entitled to indemnity from the time charterer. As noted above, clause 8 does not make the ship's master or other members of its crew the time charterer's agents with respect to all of their decisions, regarding the cargo, made during cargo operations. Each party exercised some control over cargo operations and could have acted to ensure that the cargo was loaded in such a manner that cargo operations would proceed with reasonable safety. Each such party therefore was charged with a duty to third parties regarding the manner in which the cargo was stowed. Because they

have not, by contract, shifted their responsibility for the manner in which those duties were exercised, neither party is entitled to indemnity from the other.

B.

Each defendant contends that the other defendant should be solely responsible for Cooper/T. Smith's negligence. The time charterer argues that the owner/operator should be solely liable because only it was in a position to prevent Cooper/T. Smith from performing its functions negligently. Conversely, the owner/operator contends that the time charterer should be responsible because it was the party that hired Cooper/T. Smith.

Notwithstanding the defendants' competing arguments, we find no error in the court's *pro rata* allocation of the stevedore's fault between the two defendants. Both parties were found to be liable in this case, not only because they were responsible for the events that led to the cargo's reaching New Orleans in the condition it did, but because they failed to take corrective action once the cargo arrived there. Neither party disputes its power, had it chosen to exercise the same, to direct Cooper/T. Smith's actions in unloading the cargo. Both parties, through their actions and their failures to act, set the stage for the accident, even if that event required the negligence of another party to appear on the scene before it could occur. Allocation of the fault between them on a *pro rata* basis is thus entirely reasonable.

V.

Because the jury should not have been charged on two of the Woodses' three theories of liability, we VACATE the judgment of the district court and REMAND for a new trial.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

 No. 88-3113

JOHN WOODS and BEVERLY WOODS,
Plaintiffs-Appellees,

and

COOPER/T. SMITH STEVEDORES,
Intervenor-Appellee,

v.

SAMMISA COMPANY, LTD., *et al.*,
Defendants.

SAMMILINE COMPANY, LTD., and
HIGHTWORTH SHIPPING LTD.,
Defendants-Third Party
Plaintiffs-Appellants,
Cross-Appellees.

v.

PIONEER NAVIGATION, LTD.,
Defendant-Third Party
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 05-30, 5 Cir., 1989, — F.2d —)
(June 30, 1989)

Before GEE, SMITH and DUHE, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. S. Smith
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANACivil Action No. 85-3163
Section "D" (3)

JOHN WOODS

versus

SAMMISA COMPANY, LTD., *et al.*

SPECIAL INTERROGATORIES TO THE JURY

1. Do you find from a preponderance of the evidence that the Defendants, vessel owner, Hightworth Shipping, Ltd. and operator, Sammiline Company, Ltd., were negligent and that such negligence was a legal cause of damage to the Plaintiff?

YES ☒ No ☐

(Note: Answer Question No. 2.)

2. Do you find from a preponderance of the evidence that the Defendant, time charterer, Pioneer Navigation, Ltd., was negligent and that such negligence was a legal cause of damage to the Plaintiff?

YES ☒ No ☐

(Note: If you answered "NO" to both Question 1 and Question 2, please have the Foreperson sign and date the Form and return to the courtroom; otherwise, please answer Question 3.)

3. Do you find from a preponderance of the evidence that Cooper/T. Smith Stevedores was negligent and that such negligence was a legal cause of damage to the Plaintiff?

YES ☒ No ☐

(Note: Answer Question 4.)

4. Do you find from a preponderance of the evidence that the Plaintiff, John Woods, was negligent and that such negligence was a legal cause of his own injuries?

Yes ☐ No ☒

(Note: Answer Question 5.)

5. What proportion or percentage of Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in terms of percentages:

Hightworth Company, Ltd. and Sammiline Company, Ltd.	10%
Pioneer Navigation, Ltd.	25%
Cooper/T. Smith Stevedores	65%
John Woods, Plaintiff	0%
TOTAL	100%

(Note: The total of the percentages given in your answer must equal 100%. Answer Question 6.)

6. What sum of money, if any, do you find from a preponderance of the evidence will fairly compensate Mr. Woods for the damages he has sustained without

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any consideration of the percentages assigned in your answer to Question 5?

Past and future lost wages and
earning capacity\$223,000.00

Past and future pain and suffering..\$300,000.00

Future medical expenses\$ 27,000.00

(Note: Answer Question 7.)

7. What amount of money, if any, will fairly compensate Mrs. Beverly Woods for her loss of consortium without any consideration of the percentages you assigned in your answer to Question 5?

\$150,000.00

SO SAY WE ALL

DATE: Oct. 28, 1987

/s/ Lloyd W. Bennett, Jr.
Foreperson

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APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

Civil Action No. 85-3163
Section "D" (3)

JOHN WOODS

versus

SAMMISA COMPANY, LTD., et al.

OPINION AND ORDER

[Filed Nov. 20, 1987]

[Entered Nov. 20, 1987]

The instant suit arises out of personal injuries sustained by John Woods, while working aboard the M/V SAMMI HERALD on July 19, 1984. At the time of his injury, the Plaintiff, a longshoreman, was a member of a crew engaged in discharging a cargo of pipe from the SAMMI HERALD, which was moored at the Chalmette slip near Arabi, Louisiana.

Initially, Woods sued the vessel owner, Hightworth Shipping, Ltd., and the vessel operator, Sammiline Company, Ltd. (hereinafter "Shipowner/Operator"), pursuant to § 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50. Mr. Woods' wife, Beverly, asserted a claim for loss of consortium against the same parties. Later, Plaintiffs amended their Complaint to add as a Defendant the vessel's time charterer, Pioneer Navigation, Ltd. (hereinafter "Time Charterer"). The Shipowner/Operator

brought a Third-Party Complaint against the Time Charterer seeking indemnity and/or contribution. The Time Charterer, in turn, counterclaimed against the Shipowner/Operator seeking recovery over from Hightworth. Lastly, Plaintiff's employer, Cooper/T. Smith Stevedores, intervened to assert its compensation lien.

Plaintiffs' claims were tried before a jury on October 26-28, 1987. The jury found in favor of Plaintiffs, John and Beverly Woods, and against Defendants, Hightworth Shipping, Ltd., Sammiline Company, Ltd. and Pioneer Navigation, Ltd. On written interrogatories, the jury apportioned fault as follows: ten percent to the Shipowner/Operator; twenty-five percent to the Time Charterer; and sixty-five percent to the Plaintiff's employer, Cooper/T. Smith Stevedores. The jury found no contributory negligence on the part of the plaintiff.

HIGHTWORTH & SAMMILINE'S THIRD-PARTY DEMAND

The Third-Party Demand of the Shipowner/Operator against the Time Charterer as well as the Time Charterer's counterclaim were tried to the court. Absent contractual indemnity, Defendants Hightworth/Sammiline and Pioneer are liable for proportionate shares of Plaintiffs' judgment.¹ Hightworth claims entitlement to full indemnity from Pioneer under the terms of their charter agreement.² Specifically, Hightworth points to Clause 8 of the Charter Party, which states:

That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary

¹ Since Cooper/T. Smith Stevedores, to whom the jury attributed the lion's share of fault (sixty-five percent) is not a party defendant, Hightworth/Sammiline's share is 10/35ths or 2/7ths and Pioneer's is 25/35ths or 5/7ths.

² The contract at issue is the standard New York Produce Exchange Time Charter with certain modifications.

assistance with ship's crew and boats. The captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, and trim, and discharge the cargo at their expense under the supervision of the captain, who is to sign Bills of Lading for cargo as presented in conformity with Mate's or Tally Clerk's receipts.

At trial, the evidence strongly supported Plaintiffs' contentions that the cargo of pipe was improperly stowed³ and that Plaintiff's injury during the offloading process was causally related to the improper stowage, as well as to improper discharge.⁴ Thus, the Shipowner/Operator argues that since its liability arises out of loading, stowing, and/or discharge operations and Clause 8 of the Charter Party allocates responsibility for those functions to the Time Charterer, Pioneer is obliged to indemnify Hightworth/Sammiline.

While the terms of Clause 8 provide that the Time Charterer was to perform the operations during which Plaintiff was injured, the court is unpersuaded that the parties intended Clause 8 to shift to the Time Charterer the Shipowner/Operator's responsibility for its own independent acts of negligence.

³ Evidence showed that a load of pipe bound for Houston overlapped a load of pipe to be discharged in New Orleans. Plaintiff contended that he was injured when a piece of New Orleans pipe being discharged struck the overlapping Houston-bound pipe, causing the aft end of the New Orleans pipe to swing around and strike him. There was also evidence of improper stowage due to insufficient dunnage as well as the lack of an alleyway between the two loads of pipe.

⁴ Clearly, had the pipe destined for Houston been offloaded before the pipe to be discharged in New Orleans (either as a result of the SAMMI HEARLD calling at the Port of Houston first or by the stevedore offloading the Houston pipe and then reloading it after the New Orleans pipe had been unloaded), this accident probably would not have occurred.

A shipowner is responsible for eliminating a dangerous condition which exists at the outset of the stevedoring operation when it has actual or constructive knowledge that the condition poses an unreasonable risk of harm to longshoreman working on board ship. *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981). After the stevedoring operation has commenced, a shipowner may be found negligent when it has actual knowledge of an unsafe condition aboard ship that threatens the safety of the longshoremen who are continuing to work despite the dangerous condition, and fails to either remedy the condition or halt the stevedoring operation. *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983). The jury was charged to this effect. There was evidence that one or more of the ship's officers knew of the improper stowage and knew that it would present dangers during the offloading. Several witnesses testified that the stevedore had informed the ship's officers that the method of stowage would require that the pipe be discharged very slowly. Thus, the Shipowner/Operator is being visited only with liability for its own acts or failure to act. In this context, I find that the Shipowner/Operator has no right to indemnification. The fact that the Shipowner/Operator's 10 percent fault translates, by operation of law, into liability for 2/7th of the Plaintiffs' judgment due to the exclusivity provisions of the LHWCA is no reason to reach a contrary result.

PIONEER'S COUNTERCLAIM

The Time Charterer argues that the discharging stevedore's fault should be borne by the Shipowner/Operator, contending that the major cause of the Plaintiff's accident was negligence in New Orleans, where the owners had "complete operational control." There is no merit to this argument, which would have Hightworth bear the responsibility for the negligent acts of an independent contractor hired by Pioneer. Accordingly, the

liability occasioned by discharging stevedore's fault will be shared by the Defendants in proportion to each Defendants' percent of fault as found by the jury.

AWARD OF PRE-JUDGMENT INTEREST

Plaintiffs have asked the court to award interest from date of judicial demand on the jury's verdict, after adding stipulated medical expenses. Defendants oppose such an award. Hightworth argues that when a maritime case is tried to a jury, only the jury, as fact finder, can grant pre-judgment interest. It is unnecessary to address Hightworth's arguments since a settled rule of law precludes the award of pre-judgment interest under the facts of this case. The law is clear that pre-judgment interest may not be awarded with respect to future damages. *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487, 491 (5th Cir. 1985), *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 n. 4 (5th Cir. 1984). The Interrogatories propounded to the jury, without objection by Plaintiffs' counsel, did not distinguish between past and future damages for lost wages and earning capacity, pain and suffering or loss of consortium.

There is no way this court can determine what portion of its award the jury would have allocated to past losses, had it been asked to do so.⁵ Accordingly, the court declines to award pre-judgment interest to the Plaintiffs.

INTERVENTION OF COOPER/T. SMITH STEVEDORES

As of November 16, 1987, Intervenor, Cooper/T. Smith Stevedores had paid Plaintiff a total of \$196,954.65, of which \$55,205.64 represented compensation benefits paid and \$141,749.01 represented payments for medical ex-

⁵ To the extent the court has discretion to award pre-judgment interest on Plaintiff's past medical expenses, the amount of which was stipulated, it declines to do so.

penses. Intervenor is entitled to be reimbursed in this amount by preference and priority out of the proceeds of Plaintiffs' judgment.

New Orleans, Louisiana, this 20 day of November, 1987.

/s/ A. J. McNamara
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

Civil Action No. 85-3163
Section "D" (3)

JOHN WOODS

versus

SAMMISA COMPANY, LTD., *et al.*

JUDGMENT

[Filed Nov. 20, 1987]

[Entered Nov. 20, 1987]

Considering the jury's answers to the Interrogatories propounded by the court at the trial of this matter, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiff, John Woods, and against Defendants, Hightworth Shipping, Ltd. and Sammiline Company, Ltd., in the amount of \$157,142.86 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiff, John Woods, and against Defendant, Pioneer Navigation, Ltd., in the amount of \$392,857.14 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiff, Beverly Woods, and against Defendants, Hightworth

Shipping, Ltd. and Sammiline Company, Ltd., in the amount of \$42,857.14 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiff, Beverly Woods, and against Defendant, Pioneer Navigation, Ltd., in the amount of \$107,142.86 with interest from date of judgment until paid.

For reasons set forth in the court's Opinion and Order of November 20, 1987;

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered herein:

1. Dismissing with prejudice the Third-Party Complaint of Hightworth Shipping, Ltd. and Sammiline Company, Ltd., against Pioneer Navigation, Ltd.

2. Dismissing with prejudice the Counterclaim of Pioneer Navigation, Ltd. against Hightworth Shipping, Ltd.

3. In the amount of \$196,954.65, in favor of Intervenor, Cooper/T. Smith Stevedores with preference and priority out of the judgment of Plaintiff, John Woods.

New Orleans, Louisiana, this 20th day of November, 1987.

/s/ A. J. McNamara

United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

Civil Action No. 85-3163

Section "D" (3)

JOHN WOODS

versus

SAMMISA COMPANY, LTD., *et al.*

AMENDED JUDGMENT

[Filed Dec. 2, 1987]

[Entered Dec. 2, 1987]

The judgment entered on November 20, 1987 is hereby AMENDED to provide as follows:

Considering the jury's answers to the Interrogatories propounded by the court at the trial of this matter, accordingly;

IT IS ORDERED, ADJUDGED and DECREED that there be judgment in favor of Plaintiff, John Woods, and against Defendants, Hightworth Shipping, Ltd. and Sammiline Company, Ltd., in the amount of \$197,642.57 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Plaintiff, John Woods, and against Defendant, Pioneer Navigation, Ltd., in the amount of \$494,106.44 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that there be judgment in favor of Plaintiff, Beverly Woods, and against Defendants Hightworth Shipping, Ltd. and Sammiline Company, Ltd., in the amount of \$42,857.14 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that there be judgment in favor of Plaintiff, Beverly Woods, and against Defendant, Pioneer Navigation, Ltd., in the amount of \$107,142.86 with interest from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs of these proceedings be borne by Defendants in the following proportions: 2/7ths by Defendants, Hightworth Shipping, Ltd. and Sammiline Company, Ltd., and 5/7ths by Defendant, Pioneer Navigation, Ltd.

For reasons set forth in the court's Opinion and Order of November 20, 1987;

IT IS ORDERED, ADJUDGED and DECREED that judgment be entered herein:

1. Dismissing with prejudice the Third-Party Complaint of Hightworth Shipping, Ltd. and Sammiline Company, Ltd., against Pioneer Navigation, Ltd.
2. Dismissing with prejudice the Counterclaim of Pioneer Navigation, Ltd. against Hightworth Shipping, Ltd.
3. In the amount of \$196,954.65, with interest from date of judgment until paid, in favor of Intervenor, Cooper/T. Smith Stevedores, with preference and priority out of the judgment of Plaintiff, John Woods.

New Orleans, Louisiana, this 2nd day of Dec., 1987.

/s/ A. J. McNamara
United States District Judge

APPENDIX G

MINUTE ENTRY
McNAMARA, J.
JANUARY 13, 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 85-3163
Section "D" (3)

JOHN WOODS

versus

SAMMISA COMPANY, LTD., *et al.*

[Filed Jan. 13, 1988]

[Entered Jan. 14, 1988]

Before the court is the Motion of Defendants, Hightworth Shipping Ltd. and Sammiline Company, Ltd. for Judgment Notwithstanding the Verdict or, alternatively, for a New Trial or Remittitur. Plaintiffs, John and Beverly Woods, Defendant and Third-Party Defendant, Pioneer Navigation, Ltd., and Intervenor, Copper T. Smith Stevedores, oppose the Motion. The Motion, set to be heard on Wednesday, January 13, 1988, is before the court on briefs, without oral argument. Having considered the memoranda of counsel and the applicable law:

IT IS ORDERED that the Motion of Defendants, Hightworth Shipping, Ltd. and Sammiline Company, Ltd., for Judgment Notwithstanding the Verdict or, alternatively, for a New Trial or Remittitur be and is hereby DENIED.

/s/ A. J. McNamara

APPENDIX H

EXCERPTS FROM THE TRIAL COURT'S
CHARGE TO THE JURY

* * *

[933] In this case, the plaintiff, John Woods, a longshoreman, seeks damages for personal injuries which he suffered while working aboard the M/V SAMMI HERALD owned and operated by the defendants Hightworth Shipping and Sammi Line [sic] Company, Ltd., and chartered by the defendant Pioneer Navigation, Ltd. And the plaintiff claims that the negligence of the defendants was the legal cause of his injuries. Now, [934] the particulars of the negligence claim of the plaintiff against the ship owner and/or operator is as follows: Plaintiff contends that the ship owner/operator, Hightworth and Sammi Line [sic] Company, Ltd., was negligent in that the ship owner/operator failed to exercise ordinary care under the circumstances. Specifically, the plaintiff claims that the ship owner/operator was negligent in one or more of the following particulars: In that it failed to turn over to the stevedores in New Orleans a safe ship because a cargo of pipe destined for Houston overlapped a loan [sic] of pipe destined for New Orleans, which created a hazardous condition for the longshoremen when they attempted to discharge the New Orleans bound pipe.

* * *

[937] As a general matter, the ship owner/operator and the charterers may rely on the stevedore to avoid exposing longshoremen to unreasonable hazards. The stevedore, as the longshoremen's employer is required to provide him with a reasonably safe place to work. They have a right to expect, that is, the defendants, that the stevedore will perform his tasks properly without supervision by the ship. In other words, the primary responsibility for the safety of the longshoremen rests upon the steve-

dore. Thus, as to conditions existing when the longshoremen began work on board the ship, you may find that the ship owner/operator and/or the charterer was negligent if you find that the defendant in question first knew of, or by exercise of reasonable care should have discovered the condition on board the ship that led to the plaintiff's injury and second, knew, or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board the ship and third, failed to exercise reasonable care to protect the longshoremen against that danger.

* * *

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NO. 89-524

Supreme Court, U.S.

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.

and

HIGHTWORTH SHIPPING, LTD.

Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,

COOPER/T. SMITH STEVEDORES,

and

PIONEER NAVIGATION, LTD.,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**RESPONDENTS JOHN AND BEVERLY WOODS'
BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

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IN THE
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RESPONDENTS JOHN AND BEVERLY WOODS'
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OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, John and Beverly Woods, respectfully
pray that the Court deny the writ of certiorari sought by
petitioners in the above-entitled proceeding.

STATEMENT OF THE CASE

Plaintiff-respondent, John Woods, was injured on July 19, 1984, while working as a longshoreman for Cooper/T. Smith Stevedoring in the number 2 hold of the petitioners' vessel, the M/V SAMMI HERALD. Prior to that date, the M/V SAMMI HERALD had been loaded in Brazil with a cargo of steel pipe. Some of this cargo was destined for New Orleans; some of it was destined for Houston. As stowed in Brazil, the Houston-bound pipe overlapped the New Orleans-destined pipe. As a result, an intended alleyway between the cargo did not at all exist. The vessel left Brazil, and the vessel-interests made the decision en route to call first at New Orleans instead of Houston, which was to have been the first port of call. While the New Orleans longshoremen were attempting to remove the New Orleans pipe, the forward end of a piece of pipe came into contact with the overlapping Houston pipe; this caused the aft end of the New Orleans pipe to whip around in the direction of the longshoremen. As Mr. Woods and his fellow longshoremen attempted to evade the swinging pipe, Mr. Woods stepped into a gap in the cargo. As he fell, the errant pipe struck him. As a result, Mr. Woods suffered serious injuries.

In Brazil, both preliminary and final stowage plans were presented to the vessel's master for his approval. The captain testified at trial that he knew that cargo, which was destined for two different ports, overlapped. He also testified that it was customary for the vessel's chief mate to inspect the cargo after it was loaded. Although the cargo of steel pipe overlapped, the captain of the M/V SAMMI HERALD acknowledged that it was his practice to leave for the next port of call even though he believed the cargo would be unsafe for a discharging stevedore.

The vessel-owner exercised authority over where the cargo was to be stowed. The vessel's captain testified that it was his crew's responsibility to supervise the loading of cargo on the vessel. In keeping with this duty, the preliminary stowage plan prepared for the cargo of steel pipe was subject to the master's approval. The ship's master had the authority to change the stowage plan. Evidence revealed that it was customary for the cargo to be loaded and carried subject to the master's approval and that the stowage of cargo was the master's responsibility. In fact, no cargo was loaded aboard vessels in Brazil over the objection of the captain. The master and the chief mate of the M/V SAMMI HERALD approved the preliminary stowage plan for the cargo of steel pipe to be loaded into the vessel's number 2 hold. That the officers of the M/V SAMMI HERALD approved the condition of the stowage of the steel in the number 2 hold before the ship left Brazil is uncontradicted.

With respect to the cargo of steel pipe, the M/V SAMMI HERALD's chief mate testified that the stowage was not in the best condition. He acknowledged that he was aware of the stowage plan for the cargo, went into the vessel's hold to inspect the stowage, and checked on the lashing of and position of the cargo. He reviewed the stowage plan before loading of the steel commenced. He had authority to recommend loading procedures to the cargo interests which oversaw the stowage of steel loaded onto the vessel. And, he acknowledged that the stevedores had no discretion to correct the loading of the cargo onto the ship.

The chief mate, who had approved the stowage of the steel before the M/V SAMMI HERALD left Brazil for

New Orleans, admitted that the stowed cargo was in the same condition when the vessel arrived in New Orleans. As was customary, he looked into hold number 2 before the New Orleans longshoremen undertook to discharge the cargo. Although the final stowage plan for hold number 2 indicated that an alleyway should have existed between the Houston-bound and the New Orleans-bound pipe, no such alleyway existed after the pipe was loaded in Brazil, and no such alleyway existed when the cargo arrived in New Orleans. Although the vessel's chief mate had the duty to approve the overall stowage of the cargo and although he also had responsibility for reviewing and accepting the stowage plan, he testified that he did not pay any particular attention to whether there were proper separations between the cargoes.

A cargo superintendent for Cooper/T. Smith also testified that the Houston-bound pipe overlapped that destined for New Orleans and that no alleyway between the two cargoes existed when the vessel arrived in New Orleans. He testified that the Cooper/T. Smith stevedoring crew did not create the overlapping. The superintendent brought the overlapped condition of the pipe to the vessel's officers' attention, informing the chief mate in particular that the discharge operation would be slow because of the overlapped cargo.

A marine surveyor testified that it appeared to him that the ship was loaded with the intent that Houston cargo would be offloaded first. He further stated that the Houston cargo could have first been unloaded in New Orleans, and he informed the chief mate of the vessel about the poor stowage. The surveyor testified that the overlapped cargo increased the hazard to longshoremen, such as respondent, and that if the vessel had first offloaded the Houston cargo, this hazard would have been lessened. But,

only the ship's officers or its charterer had the authority to order that the Houston pipe be offloaded first.

No question exists but that the vessel's officers were aware at the time that the M/V SAMMI HERALD left Brazil that the Houston-bound pipe overlapped the pipe destined for New Orleans. Thus, well before the Cooper/T. Smith longshoremen, including Mr. Woods, arrived at the dock to commence discharge of steel pipe from the aft portion of the M/V SAMMI HERALD's number 2 hold, the vessel's chief officer and other representatives of the petitioners were perfectly aware that the vessel's number 2 hold had not been stowed in accordance with a stowage plan that was both devised and approved by the petitioners themselves. Pipe destined for Houston overlapped pipe to be offloaded in New Orleans. No clear alleyway existed between these cargoes.

The vessel and cargo interests made the decision to call first at the port of New Orleans, and, once there, they failed to direct the longshoremen first to remove the overlapped Houston pipe. The longshoremen realized that they were forced to confront an unusual situation. The crane operator for Cooper/T. Smith testified that when the ship's crew opened the hatch, he saw "a bad situation." When asked whether he saw an alleyway between the pipe, he testified bluntly "No way." He also testified that it was impossible to remove the New Orleans pipe without its coming into contact with the Houston-bound pipe. Yet, no one gave the longshoremen permission to discharge the Houston pipe first, a decision that was not theirs to make. If there had been an alleyway between the two cargoes, the crane operator believed that no problem would have existed, for the New Orleans pipe would not have inevitably caught on the Houston pipe.

A marine surveyor hired by Cooper/T. Smith Stevedores testified that overlapping of steel cargo, like that in the number 2 hold of the M/V SAMMI HERALD, increased the hazard to longshoremen. Another expert marine surveyor testified similarly, finding that the stowage of the pipe in the number 2 hold was "very poor" and that it would have been much less hazardous for the vessel to have ordered the Houston pipe offloaded first. The Houston pipe was not discharged before the New Orleans pipe for economic reasons. As Henry Charles Isenberg, Senior Vice President for Cooper/T. Smith Stevedores, testified, it would have cost the time-charterer Pioneer "many thousands of dollars" more to have offloaded the Houston cargo first.

As a result of his being struck by improperly stowed pipe on petitioners' vessel, John Woods suffered a cerebral concussion, an open comminuted fracture of the right hip, facial abrasions, an open fracture of the right kneecap, a fractured left wrist, loss of teeth, and a fracture of the back's transverse processes, among other injuries. He has undergone several surgeries, and additional surgery has been recommended. He continues to receive physical therapy. Mr. Woods has also received psychiatric treatment for major depression as a result of his physical disabilities.

ARGUMENT

THE FIFTH CIRCUIT CORRECTLY HELD THAT A VESSEL-OWNER HAD A DUTY OF ORDINARY CARE TO PROTECT LONGSHOREMEN DISCHARGING CARGO THAT WAS IMPROPERLY AND DANGEROUSLY STOWED AT A PRIOR PORT WHEN THE DANGEROUS CONDITIONS WITH RESPECT TO THE CARGO WERE RECOGNIZED AND CREATED BY THE VESSEL-OWNER.

The applicable standard of care in this §905(b) case is that enunciated by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). In *Scindia*, the Court held that the duty of a shipowner who turns a vessel over to a stevedore

... extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

451 U.S. at 166-67 (citations omitted) (emphasis added).

The *Scindia* Court also held that

... absent contract provision, positive law, or custom to the contrary ... the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous

conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.

451 U.S. at 172 (emphasis added).

The *Scindia* Court goes on to state, however, that

... if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoremen cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard.

Id. at 175.

In such circumstances, if the vessel knows of a danger within the cargo operations and knows that the stevedore is continuing to work in danger, then the vessel is imputed to have the knowledge that "an unreasonable risk of harm" exists for the longshoremen. *Id.* at 175-76. In "such circumstances, [the vessel] ha[s] a duty to intervene." *Id.* at 176. The same is certainly true whenever, as in the case at bar, an unreasonably dangerous condition exists at the outset of the stevedoring operations. In such cases, the vessel "must be deemed to have been aware of [the] condition." *Id.*

In the case at bar, abundant evidence was presented with respect to the extent of the vessel-interests' knowledge of the unreasonable risk of harm posed to the longshoremen because of the improperly stowed cargo of

steel. No question existed but that the vessel and its owners actually knew that the cargo in hold number 2 had been improperly stowed. The vessel's stowage plan did not call for the pipe to be overlapped. The vessel's officers had the "final say so" over the stowage of their ship. Because of this, only the ship's officers could have given an order to have the Houston-bound pipe offloaded before the New Orleans cargo, a decision that would have considerably lessened the unreasonable danger confronted by the longshoremen.

It is also undisputed that the cargo was loaded in Brazil, and respondent, his employer, and his coemployees had absolutely nothing to do with the manner in which the cargo was stowed on the M/V SAMMI HERALD. Thus, the vessel-interests breached their duty to exercise ordinary care under the circumstances to turn over a ship in a reasonably safe condition to the discharging stevedore. The vessel's master, mate, and crewmembers were aware of the overlapped nature of the cargo prior to the commencement of the discharge operation. The overlapped condition of the pipe was contrary to the vessel's own cargo plan. Notwithstanding the vessel-interests' actual knowledge of the dangerous condition of the stowage in the case at bar, *Scindia* requires only that the vessel have constructive knowledge of such a condition. See *Scindia*, 451 U.S. at 166-67.

The evidence produced at trial demonstrated that petitioners Sammiline Company, Ltd. and Hightworth Shipping, Ltd., the owner-operator of the M/V SAMMI HERALD, and Pioneer Navigation, Ltd., the vessel's time-charterer, played an active role in the stowage of the cargo of steel pipe in hold number 2 in Brazil. An agent for Pioneer Navigation testified that Borda Livre's practice, as a surveyor of cargo, was not to give instructions to loading

stevedores in Brazil with respect to how the cargo was to be loaded unless the vessel's master asked Borda Livre to do so. The preliminary stowage plan for the cargo was subject to the master's approval. The master of the M/V SAMMI HERALD had the power to change the stowage plan simply because any cargo loaded on his vessel was carried subject to his approval. Stowage remained the master's responsibility. No cargo was loaded aboard the M/V SAMMI HERALD over the objection of the master. In the case at bar, the master approved the stowage plan. In particular, the master and chief mate of the vessel followed the loading operations.

In the case at bar, the chief mate of the M/V SAMMI HERALD testified that he undertook the duty, on behalf of the vessel, to oversee loading of the cargo in Brazil. He would go into the vessel's holds to check the lashing and position of the cargo. He acknowledged that he had authority to and actually did recommend procedures for loading to the cargo interests. And, he acknowledged that the loading stevedores in Brazil did not have the authority to correct the loading of the cargo. Most importantly, he approved the condition of the cargo's stowage before the ship left Brazil, even though he confessed that the stowage was not in the best condition. He admitted that the cargo, as stowed in Brazil, was in this same substandard condition when the M/V SAMMI HERALD arrived in New Orleans. He knew this because he again inspected the holds of the vessel, including the number 2 hold, before the discharge operations commenced. He was also aware of the stowage plan, which called for an alleyway between the cargo and which he reviewed prior to the discharge of the cargo.

The vessel's master testified that it is customary for the chief mate to inspect cargo after it has been loaded onto

the vessel. He also testified that the cargo of steel pipe, albeit destined for two different ports, was overlapped as loaded in Brazil. Yet, he testified that he left for New Orleans even though he believed the cargo might be unsafe for the discharging stevedores. He did this for the simple reason that he believed he was not in a position to put the charterer's economic expectations at risk.

Under *Scindia*, the shipowner is "... responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations." *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110, 115 (5th Cir. 1981). In *Lemon*, the jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo and that this negligence proximately contributed to the plaintiff's injury. The court found that the chief mate had actual knowledge of an "improper loading technique and failed to take actions to either correct the stowage or warn the plaintiff or his coworkers of the dangerous conditions contained within the stow." *Id.* at 116. This is precisely the situation in the case at bar. Evidence demonstrates that the vessel's officers and crew had actual knowledge of the fact that the cargo in hold number 2 had been improperly loaded and stowed. No evidence exists to the contrary to suggest that they undertook to correct the stowage or to warn the longshoremen of the danger. Evidence furthermore demonstrates that the improper stowage was brought to the attention of the vessel prior to the commencement of the discharge operation. As the *Lemon* court made clear, "the ability of a longshoreman to recover cannot turn on who was in the best position to recognize and remedy a dangerous condition when that condition was created by a vessel owner who knew or should have known of its existence prior to the stevedore's operations." 656 F.2d at 116.

In *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128 (5th Cir. 1986), the plaintiff was injured when he slipped from a grease covered ladder. Defendant, like those in the case at bar, contended that it was justified in relying on the ship-repairer's "judgment that the conditions, though perhaps dangerous, were nonetheless safe enough." *Id.* at 131. The trial court found, however, that only a complete degreasing of the work area prior to the repair operations undertaken by plaintiff's employer would have made the workplace safe. In affirming a judgment for the plaintiff, the Fifth Circuit held that it was not reasonable for the vessel to rely on the stevedores' judgment that "conditions were adequately safe." *Id.* at 132. Because only complete degreasing would remedy the dangerous condition, the vessel knew that the dangerous condition could not be neutralized. The *Barrios* court also noted that the cost of the degreasing would be so high that "in the absence of express instructions" from the vessel, the ship-repairer would not undertake the task on its own. *Id.* at 132. Similarly, in the case at bar, the vessel-interests knew that the Houston-bound pipe overlapped the pipe to be discharged at New Orleans. Thus, it was simply not reasonable for the vessel-interests to rely on the stevedore's judgment that the New Orleans pipe could be discharged in advance of the Houston pipe in an adequately safe manner. As a marine surveyor testified, it was impossible to discharge the New Orleans pipe without striking the Houston cargo. The crane operator for the longshoring crew found this to be true as well. In addition, the longshoremen did not have authority to discharge the Houston pipe.

In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), longshoremen in the port of New Orleans were ordered to unload coffee from the hold of a vessel. Similar to the cargo of steel pipe in the case at bar, the sacks of coffee were not properly secured, nor were they

supported by dunnage. Like the steel in the case at bar, "the sacks appeared to have been jammed or thrown into the hold." *Id.* at 298. Four longshoremen testified that they believed the stowage was dangerous. One of the longshoremen complained to the ship's mate about the stowage, but the mate only nodded his head. *Id.* This is exactly what the stevedore's supervisor experienced in the case at bar when he informed the ship's mate about the poor stowage of the cargo. One of the longshoremen in *Harris* also complained to his superintendent, as did one of the longshoremen in the case at bar. Similar to the longshoremen in the case at bar, the longshoremen in *Harris* testified that there was nothing they could do about the dangerous condition of the stow but to try to unload it. *Id.* at 298.

The trial court in *Harris* found, as petitioners in the case at bar would have this Court hold, that because the improperly stowed cargo created an obvious danger and because the longshoremen knew of this danger, the ship was relieved of any liability under 33 U.S.C. §905(b). The Fifth Circuit, however, reviewed the Court's decision in *Scindia* as well as its own precedent in *Lemon*, and it held that a shipowner can "be liable for negligently stowed cargo which caused injury." *Id.* at 299. As in *Lemon*, the negligence which had caused the plaintiff's injury in the *Harris* case "occurred in the method and manner of stowing cargo that was delivered to the longshoremen and stevedore." *Id.* at 299. Because the chief mate of the ship had knowledge of the prior improper loading techniques and had failed to correct the improper stow or to warn the longshoremen of the danger, the *Harris* court held that the shipowner must be "responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations." *Id.* at 299 (quoting *Lemon*, 656 F.2d at 115).

In *Harris*, evidence existed that the danger was obvious and that the shipowner contributed to it by not having dunnage. Evidence existed as well that the vessel-interests had knowledge prior to plaintiff's injury that the cargo was improperly stowed and that "the longshoremen were continuing to unload the cargo despite the inherent danger." *Id.* at 299. The fact that the danger was "obvious" was not deemed a complete defense to the longshoreman's suit "because when faced with an openly dangerous shipboard condition, the longshoremen's 'only alternatives would be to leave his [sic] job or face trouble for delaying the work.'" *Id.* at 299 (quoting *Stass v. American Commercial Lines, Inc.*, 720 F. 2d 879, 882 (5th Cir. 1983), quoting *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976)). Accord *Scindia Steamship Navigation Co. v. De Los Santos*, 451 U.S. 156, 176 n.22 (1981). The *Harris* court specifically found that "a longshoremen's [sic] own knowledge of a shipboard hazard will not negate a shipowner's duty of care which would otherwise exist." *Id.* at 300 (quoting *Stass v. American Commercial Lines, Inc.*, 720 F.2d at 882, quoting Note, 56 Tul. L. Rev. 1421, 1432 (1982)); *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir. 1989).

In the case at bar, as in *Lemon*, *Barrios*, and *Harris*, a stevedoring crew was confronted with the task of discharging cargo that was improperly stowed in a vessel at a prior port of call. The stevedores did not in any way contribute to the improper stowage. The vessel-interests, through the vessel's own officers, various marine surveyors, and other individuals, were made fully aware of the problems and dangers posed by the improperly stowed steel. Yet, the vessel-interests failed to act. They failed to direct that the Houston cargo be offloaded first, either in New Orleans (where it could later be reloaded onto the vessel) or in Houston. Although members of the ship's crew

observed the offloading operation during its slow and difficult course, the vessel-interests failed to intervene in order to authorize a safer means of discharge. Finally, the longshoremen themselves continued to work for the simple reason that they knew they would not otherwise be paid. Whether knowledge of an unreasonably dangerous condition that existed from the outset of a stevedoring operation is chargeable to the vessel-owner is a "triable issue." *Scindia*, 451 U.S. at 179. In the case at bar, the jury properly found that the vessel-interests were well-aware of the hazards posed by the dangerous stowage of cargo and did nothing either to warn or to protect the respondent.

In their petition for a writ of certiorari, petitioners challenge the well-established standard of care in a §905(b) case. In *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983), the Fifth Circuit interpreted *Scindia* to mean that "Once loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers only in the event of actual knowledge of the danger and actual knowledge that he cannot rely on the stevedore to remedy the situation." *Id.* at 1038-39. In footnote 12, the *Helaire* court opines that "[t]he opinion in *Scindia* recognized that the owner's actual knowledge of a dangerous condition which later injured a longshoreman would not in itself make him negligent. It might well be 'reasonable' for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough." *Id.* at 1039, n.12. In *Helaire*, however, the court specifically confronted a situation in which a loading operation had already commenced. In the case at bar, the stowage of steel pipe in Brazil created an unsafe condition aboard the vessel that preexisted the New Orleans longshoremen's discharge operation. Thus, the case at bar is more factually akin to *Barrios*, *Lemon*, and *Harris* than to *Helaire*. The improper stowage was not only

a condition of which the vessel-owner had actual knowledge, but the vessel-interests had actual knowledge as well that they could not rely on the longshoremen to remedy the hazardous stowage simply because the stevedores did not have the authority first to offload the Houston pipe (before discharging the New Orleans cargo) or to order that the M/V SAMMI HERALD first call at Houston.

The *Helaire* court's suggestion that "it might" be reasonable for the owner to rely on "the stevedore's judgment that the condition, though dangerous, was safe enough," does not translate into a hard and fast rule, which suggests that a vessel-owner is in all cases entitled to rely absolutely on a stevedore's judgment. If this were the case, a vessel-owner, despite actual knowledge of a dangerous condition in the stowage, would never be legally responsible for hazardous conditions preexisting a longshoreman's appearance aboard a ship because it could always swear that it relied upon the stevedore's judgment. *Scindia* holds just the opposite in stating that a vessel-owner cannot rely upon a stevedore to correct a dangerous situation if it has actual knowledge that the stevedore cannot remedy the situation. See *Scindia*, 451 U.S. at 175. As the Fifth Circuit held in *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1247 (5th Cir. 1982), the mere fact that a dangerous condition is open and obvious to the stevedore does not bar a longshoreman's recovery under §905(b). Similarly, in the case at bar, the fact that the stevedores actually undertook to discharge cargo is not proof that they believed it was safe to do so. In fact, the evidence suggests that the manner in which the cargo was stowed aboard the M/V SAMMI HERALD was so unusual that the stevedores were informed prior to discharging the steel that they would need to work very slowly because of the hazardous conditions.

In their petition in support of a writ of certiorari in the case at bar, petitioners contend that review is warranted by the Court on the basis that the Fifth Circuit's jurisprudence is in direct conflict with the holding of the Third Circuit in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1733 (1988). In *Derr*, the Third Circuit held that the shipowner had "no duty to supervise or [to] inspect cargo loaded or unloaded by stevedores and therefore [could] not be held liable for injuries arising out of the stevedore's failure to perform his job properly." *Id.* at 493. This reasoning must be analyzed in light of the facts in *Derr*. As the Third Circuit noted, the real issue before it was "not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo." *Id.* at 495 (emphasis added). The *Derr* court found that the vessel's duties under §905(b) were not increased merely because cargo had been loaded by a foreign stevedore. In *Derr*, the injured longshoreman had contended that the vessel was negligent for its failure to inspect or supervise the stowage of cargo. In the case at bar, however, evidence suggests that the vessel-interests did indeed inspect and supervise the stowage of cargo in Brazil, thereby undertaking an affirmative duty with respect to the cargo's stowage. The *Derr* court specifically left "open the issue of a duty by the ship" when evidence suggests "that the cargo presented an exceptional situation." *Id.* at 496 n.3. As the *Derr* court further noted, the district court in that case "did not reach the issue of the vessel's actual knowledge of improper stowage." *Id.* In the case at bar, the district court and the jury did reach this issue, for abundant evidence was presented that the vessel had actual knowledge of the improper stowage. In the case at bar, the vessel-interests assumed a duty with respect to a plan for the stowage of cargo, and they breached the standard they themselves had set concerning this plan. Furthermore, in

the case at bar, unlike *Derr*, the vessel-owner changed the port of entry from Houston to New Orleans, thereby increasing the hazard to offloading longshoremen. *Derr* is thus factually inapposite both to the case at bar and to the long line of Fifth Circuit jurisprudence, with which petitioners allege *Derr* is in conflict. Accordingly, certiorari is not warranted in this case to resolve what petitioners perceive as a split of authority within the circuits with respect to the cause of action governed by 33 U.S.C. §905(b).

CONCLUSION

For the foregoing reasons, respondents submit that the Court should deny petitioners' writ of certiorari.

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NOV 3 1989

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING LTD.,
Petitioners,
v.
JOHN WOODS, BEVERLY WOODS,
COOPER/T. SMITH STEVEDORES,
and
PIONEER NAVIGATION, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF SAMMILINE COMPANY, LTD.
AND HIGHTWORTH SHIPPING LTD.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

 No. 89-524

SAMMILINE COMPANY, LTD.
 and
 HIGHTWORTH SHIPPING LTD.,
 v. *Petitioners*,¹
 JOHN WOODS, BEVERLY WOODS,
 COOPER/T. SMITH STEVEDORES,
 and
 PIONEER NAVIGATION, LTD.,
Respondents.

 On Petition for a Writ of Certiorari to the
 United States Court of Appeals
 for the Fifth Circuit

REPLY BRIEF OF SAMMILINE COMPANY, LTD.
 AND HIGHTWORTH SHIPPING LTD.

PREFACE

Respondents John and Beverly Woods² do not challenge the issues as stated in the petition. They do not dispute

¹ Petitioners' Rule 28.1 statement is set forth at page ii of their petition. Petitioners, Sammiline Company, Ltd. and Hightworth Shipping Ltd., have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

² Respondents John and Beverly Woods are the only parties to file an opposition to this petition. Accordingly, this reply brief addresses only the matters urged by them.

that a serious conflict exists among at least eight circuits concerning the duties that a vessel owner owes to discharging longshoremen with regard to the condition of cargo as stowed by an independent loading stevedore. They do not question that the Fifth Circuit expressly recognized in the decision below that its holding directly conflicts with the Third Circuit's holding in *Derr v. Kawasaki Kisen, K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, — U.S. —, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988), concerning interpretation of this Court's decision in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). Nor do they challenge the fact that the circuits that have addressed this issue have come to no less than three different interpretations concerning the duty that is owed under *Scindia*. Most importantly, respondents do not deny that a shipowner's liability or non-liability to longshoremen under *Scindia* and Section 5(b) of the Longshore and Harbor Workers' Compensation Act depends on the circuit in which the shipowner is sued. Stated otherwise, Mr. and Mrs. Woods have not challenged the contention that this case presents a question of great importance to the maritime law upon which the circuits seriously disagree.

Rather, aided by the absence of a record before the Court at this early stage of this writ proceeding, Mr. and Mrs. Woods have asserted facts either that are not supported by the record, or that are distortions of the testimony in the record, in an attempt to dissuade this Court from granting a writ. They assert that this petition should be denied because the facts and issues in this case are different from those before the Third Circuit in *Derr*.

Respondents' opposition provides no valid reason for denying this writ. The purported distinguishing facts that respondents assert are not supported by the record and did not form the basis of the Fifth Circuit's decision, which expressly recognized that its holding is in direct conflict with *Derr*.

I. SEVERAL FACTUAL ASSERTIONS MADE BY MR. AND MRS. WOODS ARE NOT SUPPORTED BY THE RECORD AND FORM NO PART OF THE FIFTH CIRCUIT'S JUDGMENT PROVIDING THE BASIS OF THIS WRIT APPLICATION

As they did before the Fifth Circuit, Mr. and Mrs. Woods seek to cloud the issue by making several factual assertions that are not supported by the record. The Fifth Circuit, in reviewing the record in this case, apparently recognized the meritless nature of these factual assertions, as they form no part of that court's decision. Likewise, respondents' factual assertions provide nothing for this Court to consider.

A. The Cargo Plan "Alleyway"

At several pages in their opposition (*e.g.*, pages 2, 4, 10), the respondents assert that the cargo stowage plan indicated that the cargo in the No. 2 hold should have been stowed so as to provide an "alleyway" between the Houston-bound cargo and the New Orleans-bound cargo. Neither the cargo plan nor the testimony supports respondents' assertion. Respondents made this same argument before the Fifth Circuit. The Fifth Circuit chose to ignore it, apparently agreeing that it is not supported by the record. In any event, as discussed below, cargo stowage is not a responsibility of the vessel owner, but is a responsibility of the time charterer and its stevedores.

B. The Vessel Owner's Alleged Responsibility for Cargo Stowage

Mr. and Mrs. Woods also assert throughout their opposition that the vessel owner had authority over where the cargo was stowed, that the vessel owner had the authority to change the stowage plan and the stowage of cargo, and that the vessel owner actually participated in the loading process.

The evidence does indicate that the vessel's chief mate reviewed the stowage plan and approved it, and that he

checked the cargo lashings. However, to state that the vessel owner had assumed control of or had participated in cargo operations is a gross misstatement. The testimony of both the ship's master and the ship's chief officer was that their concern and authority regarding cargo stowage related only to matters affecting vessel navigational safety. Their testimony indicated that their responsibility extended only to making sure the cargo stowage was secure and did not render the vessel unseaworthy for its ocean voyage. Nothing in the testimony of the master or chief officer indicated that the ship's officers had any other authority or control with regard to cargo operations.

Furthermore, the M/V SAMMI HERALD was under time charter to Pioneer. Under the specific terms of the time charter, as is the custom under maritime law, Pioneer, the time charterer who "leased" the vessel's cargo carrying space, was responsible for the stowage of cargo and all cargo operations. In this regard, the evidence demonstrated that Borda Livre, a Brazilian contractor of Pioneer, prepared the stowage plan (which the ship's chief officer merely reviewed to assure navigational safety) and that Pioneer's Brazilian stevedores loaded the cargo. Likewise, in New Orleans, Cooper/T. Smith, an independent contractor stevedore hired by Pioneer, conducted all aspects of the cargo operations. Outside of concerns for navigational safety, the record does not support respondents' assertion that the vessel owner had any authority or control over any cargo operations.

C. The Vessel Owner's Purported Knowledge Concerning the Alleged Dangerous Condition of the Cargo Stow

Mr. and Mrs. Woods further assert throughout their opposition that the vessel owner, through the master, chief officer, and crew, knew that the condition of the cargo as loaded was unsafe and would pose a risk of harm to un-

loading longshoremen, yet did nothing to change the stowage or to intervene in the unloading process or to stop the discharge.

Undoubtedly, the vessel's master and chief officer knew that some pieces of the Houston pipe cargo overlapped some pieces of the New Orleans pipe cargo. However, nothing in the record indicates that the vessel owner, including the vessel's master, officers and crew, had any knowledge that this condition would pose any risk of danger to the discharging stevedore and his longshoremen. In fact, Mr. LaFrance, the stevedore superintendent in charge of this longshoring discharge operation, testified that he did not believe that the stow presented any unreasonable or unusual risk of harm to his experienced longshoremen. Indeed, absent such actual knowledge of danger, the shipowner had no duty under *Scindia* to intervene in the cargo operation. See *Scindia*, 451 U.S. at 166-69. How can a shipowner, who is not an expert in cargo operations, be expected to realize that a cargo stow is dangerous when the stevedore superintendent, the recognized expert in cargo discharge operations, testifies that he observed no condition that presented any particular danger? There simply is no evidence in the record indicating that petitioners Sammiline and Hightworth had any knowledge that the stowage condition in the No. 2 hold presented any unreasonable risk of danger to the longshoremen. Furthermore, the duty that a shipowner (who is not a cargo expert) owes to an "expert and experienced" stevedore and his longshoremen to correct such cargo hazards is exactly the issue presented for consideration by this writ application.

Also in this regard, Mr. and Mrs. Woods argue that the vessel's master testified that "it was his practice to leave for the next port of call even though he believed the cargo would be unsafe for a discharging stevedore." Writ Opposition, 2. This remark takes the master's testimony out of context. The testimony to which respondents refer

was addressed to a hypothetical question posed by respondents' counsel. Counsel for Mr. and Mrs. Woods asked the master: "Suppose that the manner in which the cargo is stowed by the stevedore does not present a hazard at sea, but will present a hazard to those who will discharge the cargo, will the captain, nevertheless, sail to the discharge port?" The vessel's foreign master, who testified through an interpreter, answered, "In that case, we sail." However, the master also qualified his statement by explaining that his authority was with regard to safety of the vessel in navigation, not safety with regard to stowage and discharge of cargo. In any event, the master testified that had he observed a condition on his vessel that he believed dangerous, he would have ordered it corrected (Record, Vol. 6, pp. 627-29). Again, the duty owed by the vessel owner (who is not an expert on cargo stowage and discharge operations) to the stevedore and his longshoremen (who are the cargo experts) to recognize and correct such a cargo hazard is the exact question presented here. Petitioners submit that this Court should grant a writ to decide this important question.

D. The Vessel's Purported Decision Regarding the Cargo Discharge Rotation

Mr. and Mrs. Woods assert that although the pipe cargo was stowed such that the Houston cargo should have been off-loaded first, the vessel owner together with the time charterer decided to sail to New Orleans first, and then decided not to unload the Houston cargo so as to render discharge of the New Orleans cargo safer. Respondents' argument is not supported by the record.

The M/V SAMMI HERALD was under time charter to Pioneer. As respondents well know and as the record clearly discloses, under the time charter the vessel was under orders from the time charterer as to which port it would first sail, and concerning when and how the cargo would be loaded and unloaded. There is no evidence in

the record indicating that petitioners (i.e., the shipowner) could have ignored the charterer's orders and ordered the vessel to proceed to Houston first. Furthermore, there is no evidence in the record indicating that the vessel owner could have ordered the New Orleans stevedore (i.e., a contractor of the time charterer) to unload the Houston cargo. The evidence is that the time charterer, not petitioners, had this authority. In any event, the suggestion that the Houston cargo should have been off-loaded was not made until after the fact—until preparation for trial—long after this accident occurred. There simply is no factual basis for respondents' contentions that petitioners had any control over the cargo discharge and port rotation decisions.

The factual assertions of Mr. and Mrs. Woods lack support in the record. The Fifth Circuit's opinion correctly recognized that the facts of this case are that petitioners did not hire, supervise, or direct cargo operations and undertook no duty in this regard. The question presented for this Court's review, upon which the Circuits are divided, is whether a shipowner assumes liability for injuries resulting from cargo stow under such circumstances.

II. THE THIRD CIRCUIT'S *DERR* DECISION DIRECTLY CONFLICTS WITH THE FIFTH CIRCUIT'S HOLDING; THIS COURT SHOULD GRANT A WRIT AND RESOLVE THE SUBSTANTIAL CONFLICT AMONG THE CIRCUITS REGARDING THE SHIPOWNER'S DUTY UNDER *SCINDIA*

Respondents do not deny that the Fifth Circuit held in this case that the shipowner has a duty imposed under *Scindia* to correct any dangerous condition in the cargo stow before turning the vessel over to the discharging stevedore. Likewise, respondents do not dispute that the Third Circuit in *Derr* reached the opposite conclusion. Nor do they deny that the rulings of the other circuits which have addressed the issue are in conflict.

Rather, they contend that this case differs from *Derr*. They assert that the vessel owner in this case did inspect and supervise the stowage of the cargo and knew of the dangerous condition, while the *Derr* decision did not address the question of the shipowner's knowledge concerning the condition of the cargo stow. Respondents' Opposition, p. 17.

First, as discussed above, respondents' purported factual distinction is without merit. As the Fifth Circuit's decision demonstrates, the record in this case does not support respondents' contention that the shipowner undertook inspection and supervision of the cargo stowage and discharge operations, or that the shipowner had any actual knowledge concerning any dangerous condition. Indeed, the Fifth Circuit, after thoroughly reviewing the record in light of the same factual accusations respondents make before this Court, based its decision on its conclusion that the time charterer and its contractors, not petitioners, controlled the cargo operations.

Second, the legal question addressed by the Fifth Circuit, is the same question addressed by the Third Circuit in *Derr*. In both cases, the courts addressed the issue whether a shipowner owes any duty to the discharging stevedore and his longshoremen under this Court's *Scindia* decision regarding the condition of the cargo stow as loaded by a stevedore in a foreign nation. Petitioners' Appendix, 9a-11a (873 F.2d at 847-49), 13a-18a (873 F.2d at 850-52); *Derr*, 835 F.2d at 493-95. Indeed, the Fifth Circuit expressly recognized that the *Derr* decision involved "remarkably similar circumstances" to the present case. Petitioners' Appendix, 9a (873 F.2d at 848). While the Fifth Circuit openly acknowledged that this case presented the same issue as addressed in *Derr*, it found itself bound to disagree with the *Derr* holding in light of its prior jurisprudence, which imposed such a duty on the shipowner. Petitioners' Appendix, 9a-11a (835 F.2d at 847-49), 13a-18a (835 F.2d at 850-52);

See also Petitioners' petition, 11-15. Clearly, a direct conflict exists between the holdings of these two courts, as well as among the other circuits that have addressed the issue. See Petitioners' petition, 13-15. This Court should grant a writ to address this substantial and important conflict among the circuits.

CONCLUSION

As discussed above and in petitioners' petition, this case presents questions of extreme importance to federal maritime personal injury and indemnity law upon which the circuits are in conflict. Respondents John and Beverly Woods have presented no valid reason for refusing to grant a writ. Petitioners respectfully submit that the Court should grant a writ of certiorari.

Respectfully submitted,

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NO. 89-524

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CLERK**

**In the
Supreme Court of the United States**

OCTOBER TERM, 1989

**SAMMILINE COMPANY, LTD.
and
HIGHTWORTH SHIPPING, LTD.
Petitioners,**

v.

**JOHN WOODS, BEVERLY WOODS,
COOPERT. SMITH STEVEDORES
and
PIONEER NAVIGATION, LTD.
Respondents.**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF IN RESPONSE
OF PIONEER NAVIGATION, LTD.**

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QUESTIONS PRESENTED

1. Respondent Pioneer Navigation, Ltd. is satisfied with the presentation of Question 1 made by Petitioners Sammiline Company, Ltd. and Hightworth Shipping Ltd., which is as follows:

Where a foreign, independent stevedore stows cargo aboard a vessel in a manner that allegedly causes an injury to a longshoreman employed by a second independent stevedore while the cargo is being discharged, and where the cargo stowage condition allegedly causing the injury is open and obvious and known to the discharging stevedore and his longshoremen, did the Fifth Circuit err in holding that the vessel's owner and operator owe a duty under Section 5(b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §905(b) and this Court's opinion in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981), to protect the injured longshoreman from the alleged unsafe condition in the cargo stow?

Questions 2 & 3 should be more accurately set forth, as follows:

2. Where the evidence at trial established that the vessel's owner and time charterer both participated in decisions concerning cargo loading, but only the vessel owner's crewmen were aboard the vessel during discharge when the plaintiff longshoreman was injured, allegedly as the result of unsafe conditions in the cargo stowage, did the Fifth Circuit correctly refuse to shift to the time charterer that percentage of fault assessed against the vessel owner for its own direct negligence where the time charter did not contain any contractual indemnity provision in favor of the shipowner?

3. Whether the Fifth Circuit correctly allocated between two joint tortfeasors, on a pro rata basis according to the respective percentage of liability of each, the liability assessed against a statutorily immune stevedore employer who was not a defendant to the lawsuit?

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STATEMENT OF THE CASE

Respondent Pioneer Navigation, Ltd. ("Pioneer", the time charterer) concurs in the Statement of the Case submitted by Petitioners (Sammiline Company, Ltd. and Hightworth Shipping Ltd., the vessel owners), insofar as that statement relates to Question 1 regarding interpretation of this Court's *Scindia* decision; however, Pioneer submits the following additional facts with reference to Questions 2 & 3 raised by Petitioners:

Pioneer respectfully submits that Petitioners' writ application omitted important facts regarding the activities of the shipowner's crew during cargo loading operations. These omissions are later rectified, but only partially, in the reply brief of Petitioners wherein it is conceded (at pp. 3-4) that, "the evidence does indicate that the vessel's chief mate reviewed the stowage plan and approved it, and that he checked the cargo lashings." Petitioners proceed to claim, however, that these activities did not result in "assumption of control" or "participation" in cargo operations because the chief mate's activities related solely to matters affecting the vessel's navigational safety. Pioneer submits that the evidence at trial showed complete retention of shipowner control throughout the charter period and the full, active participation in cargo loading by the vessel's crew that plainly went beyond navigational safety. As previously noted by Respondents John and Beverly Woods, the vessel's chief mate reviewed the stowage plan and approved it and, by his own admission, the chief mate inspected all cargo as it was loaded and stowed. Additionally, several other witnesses testified at trial that the ship's command retained ultimate authority to make changes to the cargo plan and also retained final authority regarding the actual stowage of cargo prior to the vessel's departure from Brazil. Petitioners also fail to note that the self-

serving, conclusionary testimony from the Master and Chief Officer concerning authority and control was contradicted by the totality of that testimony, by Pioneer's witnesses, by several independent witnesses, and, at the end, by the jury. It should also be noted that at New Orleans, the port of discharge where the longshoreman's injury occurred, Respondent Pioneer had no agents, employees or representatives aboard the vessel having any power or authority to influence cargo discharge. Pioneer's only representative was an independent cargo surveyor dispatched solely to note and photograph any cargo damage occurring during discharge. Petitioners, however, maintained a full crew aboard the vessel during discharge, including the same Master and Chief Officer who had inspected and approved the loading of the vessel.

There is no evidence that there had ever been any change in the vessel's discharge rotation. Only a marine surveyor hired by the plaintiff's employer testified that it "appeared" to him that the ship had been loaded with the intent that if first be offloaded at Houston, but he had nothing further to offer other than his own speculation. There was no evidence from any vessel's or charterer's personnel that a change in discharge rotation had been made because, in fact, no such change had been made. Finally, with respect to the argument that the Houston cargo could have been unloaded in New Orleans prior to discharging the New Orleans cargo, it is uncontradicted that no one present in New Orleans, including the stevedoring company, ever suggested to vessel or charter interests that this be done. While it is true that this would have made discharge more expensive, the senior vice president for the stevedore testified that time-charterer Pioneer had never before been unreasonable in following any recommendations made by the stevedore regarding cargo handling. Thus, if this had been considered by those present at the time, there was no

reason for the stevedore to refrain from making the suggestion because the stevedore would have been paid the extra discharge costs. The vessel interests relied upon the expert and experienced stevedoring firm of Cooper/T. Smith Stevedores to make all decisions regarding the discharge of cargo from the M/V SAMMI HERALD, but no request or suggestion to offload the Houston cargo was ever made at this time. The fact is that discharge had proceeded without incident for two and one-half hours before plaintiff's accident and was subsequently resumed and completed without incident and without any change in the discharge method or procedure.

ARGUMENT

- I. THE FIFTH CIRCUIT'S HOLDING THAT A SHIPOWNER OWES A DUTY TO DISCHARGING LONGSHOREMEN CONCERNING THE OPEN AND OBVIOUS CONDITION OF CARGO STOWED BY INDEPENDENT CONTRACTOR STEVEDORES CONFLICTS WITH THIS COURT'S *SCINDIA* DECISION AND WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL.

A conflict exists within the circuit courts of the United States regarding the liability of a shipowner for open and obvious cargo stowage conditions which result in injury to discharging longshoremen. The circuit courts have acknowledged this conflict. For example, in the instant case, the Fifth Circuit, in referring to the case of *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1733 (1988), stated that, "At least one court has accepted this [Petitioners'] argument under remarkably similar circumstances." (Petitioners' Appendix A, p. 9a) The Fifth Circuit also stated, "Our court, however, has already visited this question and reached the opposite result." (Petitioners' Appendix A, p. 10a)

The *Derr* court had previously noted the conflict existing within the various circuit courts of appeal. Referring to *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), the Third Circuit flatly stated, "We cannot accept the *Turner* analysis." 835 F.2d at 494. Moreover, in referring to various Fifth and Eleventh Circuit opinions, the Third Circuit remarked that, "It is true that some courts of appeals have read the law in a manner compatible with appellants' arguments." 835 F.2d at 494. Nonetheless, the Third Circuit rejected these arguments of the plaintiff longshoremen in *Derr*. These exact arguments were accepted by the Fifth Circuit in the instant case.

The alleged factual distinctions between *Derr* and the instant case are not significant. The Woods assert that in *Derr* the vessel interests did not inspect the loading, that the district court in *Derr* did not reach the issue of the vessel's actual knowledge of improper stowage, and that there was no evidence of a change in discharge rotation. However, the *Derr* court indeed acknowledged that the cargo had been inspected by an independent cargo surveyor hired by the vessel and that the chief mate had observed the condition of the cargo. 835 F.2d at 497. Also, while the district court did not reach the issue of actual knowledge of improper stowage, this was irrelevant to the *Derr* court because, as in the case at hand, the stowage condition was open and obvious and because the chief mate had knowledge of the alleged condition, having observed the cargo. Finally, there was no evidence in the record of this case that the discharge rotation had been changed from Houston to New Orleans, but, in any event, this would not affect the operative fact that the condition was open and obvious.

This Court should review this issue and restore uniformity to an important area of maritime law.

- II. THE FIFTH CIRCUIT CORRECTLY REFUSED TO SHIFT TO THE TIME CHARTERER THAT PERCENTAGE OF FAULT ASSESSED AGAINST THE VESSEL OWNER FOR ITS OWN DIRECT NEGLIGENCE WHERE THE APPLICABLE TIME CHARTER DID NOT CONTAIN AN INDEMNITY PROVISION IN FAVOR OF THE SHIPOWNER AND WHERE THE EVIDENCE AT TRIAL ESTABLISHED THAT BOTH THE VESSEL'S OWNER AND THE TIME CHARTERER PARTICIPATED IN DECISIONS CONCERNING CARGO STOWAGE.

Respondent Pioneer submits that granting of a writ of certiorari with respect to the second question raised by Petitioners is not appropriate. Petitioners attempt to create a conflict among the circuit courts of appeal by arguing that the Fifth Circuit decision of *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied* sub nom., *Southern Stevedoring & Contracting Co. v. D/S Ove Skou*, 400 U.S. 902 (1970) conflicts with the decision of the Second Circuit in *Fernandez v. Chios Shipping Co., Ltd.*, 542 F.2d 145 (2d Cir. 1976) and the Ninth Circuit decision of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). However, *Ove Skou* was not controlling in the instant case on the indemnity issues and, instead, both parties were held responsible based upon their own percentage of fault.

All claims against Pioneer would have been dismissed had Petitioner's version of *Ove Skou* been followed, but

the District Court, in denying the claims for indemnity asserted by both Petitioners and Respondent, did not even mention the *Ove Skou* decision. (Petitioners' Appendix D, p. 37a, *et seq.*) Furthermore, the Fifth Circuit, in reviewing Respondent Pioneer's claim for indemnity under *Ove Skou*, noted that the *Ove Skou* holding did not apply where there was evidence that the time charterer exercised operational control over the loading operation. Indeed, the Fifth Circuit in the instant case noted, "...this is precisely the case contemplated in *Ove Skou* in which we stated that there may be 'circumstances which would give rise to liability for actions taken by an independent contractor'." (Petitioners' Appendix A, p. 30a) To the extent that the time charterer did exercise control, the Fifth Circuit, like the other circuit courts, held that the time charterer would be liable for its negligence. Similarly, to the extent the shipowner retained operational control over cargo operations, it would be found liable for its own negligence. *Ove Skou* is not mentioned by the Fifth Circuit in discussing Petitioners' claim for indemnity. Stated differently, this admiralty claim was tried to the jury on a comparative negligence basis, which has been the rule in maritime cases since this Court's decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). Each defendant was assessed only for its own negligence and, because the time charter does not contain an indemnity clause, the Fifth Circuit correctly ruled that neither party was entitled to indemnity from the other for damages related to a cargo condition created jointly by both parties.

The District Court in the instant case, after hearing the evidence, was "... unpersuaded that the parties intended Clause 8 to shift to the time charterer the shipowner/operator's responsibility for its own independent acts of negligence." (Petitioners' Appendix D, p. 39a)

Therefore, the court looked to the specific facts presented at trial and to the jury's interpretation of those facts. The Fifth Circuit, reviewing these findings, held that, "Each party exercised some control over cargo operations...each such party therefore was charged with a duty to third parties regarding the manner in which the cargo was stowed. Because they have not, by contract, shifted their responsibility...neither party is entitled to indemnity from the other." (Petitioners' Appendix A, pp. 30a-31a) This decision is not based on *Ove Skou*, does not give rise to any conflict within the circuit courts and, based as it is on jury findings resulting from the specific facts of this case, does not raise an important issue of law requiring review by this Court.

It is also to be noted that *Ove Skou* was decided in 1970, when a shipowner could be held liable to injured longshoremen on account of unseaworthiness, which imposes liability without fault, a remedy that was not available to longshoremen at the time of this case in which negligence is the predicate to recovery, and also before this Court's *Reliable Transfer* decision in 1975 which apportioned fault according to the participating negligence of the parties to the damage action.

III. THE FIFTH CIRCUIT CORRECTLY ALLOCATED BETWEEN TWO JOINT TORTFEASORS, ON A PRO RATA BASIS ACCORDING TO THE RESPECTIVE LIABILITY OF EACH, LIABILITY ASSESSED AGAINST THE LONGSHOREMAN'S STATUTORILY IMMUNE STEVEDORE EMPLOYER.

Petitioners finally request review of the Fifth Circuit's holding that the shipowner and time charterer in the instant case must share responsibility for the negligence of the injured longshoreman's stevedore employer. There were arguments raised in the lower courts by both Peti-

tioners and this Respondent that neither should be found responsible to any extent for the negligence of plaintiff's stevedore employer. Petitioners argued that the time charterer, Pioneer, who hired the stevedore, should bear full responsibility for the stevedore's fault. Respondent Pioneer, on the other hand, argued that because the stevedore's negligence occurred at New Orleans, where there were no representatives of Pioneer aboard the vessel, only the shipowner was in the position to take preventive measures and reduce the likelihood of injury, as discussed in this Court's decision of *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 314 (1964). The district court did not adopt either argument, but instead allocated fault on a pro rata basis based upon the negligence against each defendant. The Fifth Circuit found no error in this allocation, "notwithstanding the defendants' competing arguments." (Petitioners' Appendix A, p. 31a) The Fifth Circuit noted that the jury had found that the actions of both parties led to the accident and, accordingly, allocation on a pro rata basis was "entirely reasonable", *Id.*; and active negligence has long been held to preclude indemnity at law as distinguished from express contractual indemnity. Petitioners now argue that there is no policy or legal reason why the shipowner should bear responsibility for the negligence of a party hired by another, but there is also no reason why the time charterer should bear responsibility when the shipowner's representatives were aboard the vessel and in the best position to prevent the negligence of that independent contractor. The stevedore employer is statutorily immune from suit and pro rata allocation of damages between joint tortfeasors for the negligence of an immune defendant has long been accepted by the courts. Such an allocation in this case does not present a question of importance to the general maritime law and further review by this Court is unnecessary.

CONCLUSION

Respondent Pioneer agrees that a writ of certiorari should be granted in this case to review the Fifth Circuit's holding that a shipowner owes a duty to discharging longshoremen concerning an open and obvious condition of cargo stowage created by independent contractor stevedores. By the Fifth Circuit's own statement, this holding is in direct conflict with the holdings of the other circuit courts of appeal. Additionally, we submit that it conflicts with the standards enunciated by this Court in the *Scindia* decision. Further, a review of the decisions of other circuit courts of appeal on this issue reveal disharmony, contradiction, and uncertainty. Accordingly, this Court should act to restore uniformity to the law on this important federal maritime question.

Further review is unwarranted and unnecessary with respect to the other questions for review raised by Petitioners. The Fifth Circuit and District Court decisions in this case on the time charter issues were based upon a reading of the contractual clause in question (which does not mention indemnity), upon an interpretation of the intent of the parties to the contract, and upon the actual activities undertaken by the parties in this case. No general principles of law were enunciated and, contrary to Petitioners' assertion, the interpretation of the specific contract in this case simply does not present a question of great importance to the maritime law or to vessel owners and charterers, who are free to contract expressly with respect to indemnity. Furthermore, the decision of the Fifth Circuit in this case does not in any way conflict with the indemnity decisions of other circuits, none of which have specifically addressed the same factual situation.

With regard to Petitioners' argument that this Court should grant a writ to consider the allocation of stevedore fault in this case, there are competing arguments available to both Petitioners and Respondent which under the specific facts of this case do not raise questions of compelling importance to the general maritime law, and there is no reason further to review the District Court's original decision to allocate responsibility for the stevedore employer's fault on a pro rata basis, unless the Court desires to consider setting aside its decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

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DEC 13 1989

JOSE E. SPANIO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

SAMMILINE COMPANY, LTD.

and

HIGHTWORTH SHIPPING LTD.,

v.

Petitioners,

JOHN WOODS, BEVERLY WOODS,

COOPER/T. SMITH STEVEDORES,

and

PIONEER NAVIGATION, LTD.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF OF PETITIONERS
SAMMILINE COMPANY, LTD. AND
HIGHTWORTH SHIPPING LTD.
TO THE OPPOSITION SUBMITTED BY
PIONEER NAVIGATION, LTD.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

 No. 89-524

SAMMILINE COMPANY, LTD.

and

HIGHTWORTH SHIPPING LTD.,

Petitioners,

v.

JOHN WOODS, BEVERLY WOODS,
 COOPER/T. SMITH STEVEDORES,

and

PIONEER NAVIGATION, LTD.,

Respondents.

 On Petition for a Writ of Certiorari to the
 United States Court of Appeals
 for the Fifth Circuit

REPLY BRIEF OF PETITIONERS
 SAMMILINE COMPANY, LTD. AND
 HIGHTWORTH SHIPPING LTD.
 TO THE OPPOSITION SUBMITTED BY
 PIONEER NAVIGATION, LTD.

PREFACE

Petitioners, Sammiline Company, Ltd. and Hightworth Shipping Limited,¹ previously filed a reply to the opposition submitted by respondents John and Beverly Woods on November 3, 1989. At the time petitioners filed that reply, respondent Pioneer Navigation, Ltd. had not filed and did not intend to file an opposition to this writ application. However, by letter of November 7, 1989, the Clerk on behalf of the Court requested that Pioneer file a response. This reply addresses the brief filed by Pioneer in answer to the Clerk's letter.

Pioneer Navigation, Ltd. does not question that the first issue in this case—regarding the liability of the vessel interests to respondents John and Beverly Woods under *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981) and Section 5(b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 905(b))—presents a conflict among the circuits that this Court should resolve.

Pioneer's only real challenge is to petitioners' second question, that is, whether Clause 8 of the New York Produce Exchange Charter Party form shifts to time charterer Pioneer all responsibility for negligence or fault giving rise to injury during cargo operations. Pioneer argues that this issue is not involved in this case.

Pioneer, without stating any reasons, also contends that petitioners' third question, concerning how the negligence of an injured longshoreman's stevedore employer should be allocated between a vessel owner and time charterer, is unimportant.

Because Pioneer's only real challenge is to petitioners' second question, this reply is limited to that question.

¹ Petitioners' Rule 28.1 statement is set forth at page ii of their petition. Petitioners, Sammiline and Hightworth, have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

THE CONFLICT AMONG THE CIRCUITS REGARDING INTERPRETATION OF CLAUSE 8 PRESENTS AN IMPORTANT QUESTION OF MARITIME LAW DIRECTLY IMPACTING LIABILITY BETWEEN THE SHIPOWNER AND TIME CHARTERER IN THIS CASE

Pioneer does not seriously contest that a conflict exists between the leading Fifth Circuit case, *D/S Ove Skou v. Hebert*, 365 F.2d 341 (5th Cir. 1966), *cert. denied sub nom, Southern Stevedoring & Contracting Co. v. D/S Ove Skou*, 400 U.S. 902 (1970), and the decisions of other circuits regarding whether Clause 8 of the New York Produce Exchange time charter form shifts liability for negligence and resulting damages related to cargo operations from the vessel owner to the time charterer. Nor does Pioneer deny that the Fifth Circuit jurisprudence interpreting this clause differs depending upon whether the damage sustained is cargo damage or personal injury damage. *See generally* Petitioners' petition, 16-19.

Rather, without making any reference to any specific testimony or evidence, Pioneer contends that petitioners Sammiline and Hightworth, as the operator and owner of the M/V SAMMI HERALD, maintained full control over cargo loading and discharge operations. Pioneer argues that the conflict between *Ove Skou* and the decisions of other circuits need not be addressed in this case, because the courts below did not address this question. Pioneer reasons that the Fifth Circuit's holding that the time charterer (Pioneer) and the Shipowner (Sammiline and Hightworth) are each responsible for their own respective negligence demonstrates that *Ove Skou* was not applied to this case. Pioneer submits that had the Fifth Circuit applied *Ove Skou* to this case, it would have been totally exonerated from all responsibility for the injuries sustained by Mr. and Mrs. Woods.

Pioneer's argument evidences a misunderstanding of both *Ove Skou* and the Fifth Circuit's ruling in this case.

The fact that the courts below held the shipowner and the time charterer responsible in tort for their own respective negligence does not demonstrate, as Pioneer claims, that *Ove Skou* was not applied to this case. *Ove Skou* addresses two questions, both of which were addressed by the Fifth Circuit. First, *Ove Skou* questions whether Clause 8 *contractually* shifts responsibility to the time charterer for all vessel-related negligence occurring during cargo operations, no matter by whom committed. *Ove Skou*, at odds with the decisions of other circuits, holds that Clause 8 does not *contractually* shift this responsibility to the time charterer. See Petitioners' Petition, 16-19; Petitioners' Appendix, 26a-31a (873 F.2d at 856-58). Second, *Ove Skou* holds that while Clause 8 does not *contractually* shift responsibility for the operational fault occurring during cargo operations, the time charterer is responsible in tort, *independently of Clause 8*, for its own negligence related to cargo operations giving rise to a personal injury. *Id.*

Thus, the Fifth Circuit's finding that Pioneer would be held responsible for its own negligence as a matter of tort law, *i.e.*, the court's finding on the second *Ove Skou* question, does not mean that the Fifth Circuit did not also address the first *Ove Skou* question, *i.e.*, whether under Clause 8, Pioneer is *contractually* responsible for all vessel fault and negligence, no matter whether committed by the shipowner or the time charterer.

This conflict among the circuits regarding the interpretation of Clause 8 plainly is an issue that the Fifth Circuit expressly addressed and decided adversely to petitioners. Petitioners, as the vessel's shipowner, asserted that as between themselves and Pioneer, Clause 8 *contractually* shifted all responsibility for all negligence and fault during cargo operations to time charterer Pioneer. Even though under the law of the other circuits, petitioners would have prevailed, the Fifth Circuit expressly held that it was bound by *Ove Skou* to hold that Clause 8

did not *contractually* shift all such responsibility to time charterer Pioneer. Petitioners' Appendix, 28a-30a and n.18 (873 F.2d at 856-57 and n.18). Only after addressing this first question did the Fifth Circuit continue to discuss whether Pioneer itself was guilty of any negligence giving rise to liability in tort. Petitioners' Appendix, 29a-31a (873 F.2d at 857-58).

Thus, the first *Ove Skou* question, *i.e.*, whether Clause 8 shifts all responsibility to the time charterer for negligence related to cargo operations, plainly is an issue of great importance to the maritime law generally and to the law as applied to this case. This case directly presents this issue upon which the circuits are in conflict. This Court should grant a writ of certiorari to consider this important issue.

CONCLUSION

Petitioners' second issue, together with petitioners' remaining issues, present important questions of maritime law that should be addressed by this Court. Respondent Pioneer, like respondents John and Beverly Woods, has presented no valid reason for refusing to grant a writ. Petitioners respectfully submit that the Court should grant a writ of certiorari to consider these important questions.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

SAMMILINE COMPANY, LTD., ET AL. v. JOHN WOODS,
ET UX., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 89-524. Decided January 16, 1990

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

The Fifth Circuit held in this case that, based on its duties to longshoremen outlined in *Scindia Steam Navigation Co. v. De los Santos*, 451 U. S. 156 (1981), a vessel can be held liable under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, as added, 86 Stat. 1263, and amended, 33 U. S. C. § 905(b) (1982 ed., Supp. V), for injuries to a longshoreman unloading a vessel caused by the defective stowage of cargo by an independent stevedore. 873 F. 2d 842, 846-849 (1989). As recognized by the court below, *id.*, at 848, the Third Circuit has held that a shipowner cannot be held liable for such injuries. See *Derr v. Kawasaki Kisen K. K.*, 835 F. 2d 490 (1987), cert. denied, 486 U. S. 1007 (1988).

The Fifth Circuit also reaffirmed its holding in *D/S Ove Skou v. Hebert*, 365 F. 2d 341 (1966), that a standard time charter clause (providing: "The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency, and Charterers are to load, stow, and trim, and discharge the cargo at their expense under the supervision of the Captain. . . .") does not shift operational control over cargo operations, and therefore responsibility for the actions of independent stevedores, from the shipowner to the time charterer. 873 F. 2d, at 856-857. The court acknowledged, *id.*, at 857, n. 18, that its reaffirmance of *Ove Skou* perpetu-

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ates a conflict with the Ninth and Second Circuits, which have held that that contractual language does shift operational control over cargo operations to the time charterer. See *Turner v. Japan Lines, Ltd.*, 651 F. 2d 1300, 1305-1306 (CA9 1981), cert. denied, 459 U. S. 967 (1982); *Fernandez v. Chios Shipping Co.*, 542 F. 2d 145, 151-153 (CA2 1976).

I would grant certiorari to resolve these conflicts.